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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1936

No. 216

SHOSHONE TRIBE OF INDIANS OF THE WIND RIVER RESERVATION IN WYOMING, PETITIONER,

vs.

THE UNITED STATES

No. 328

THE UNITED STATES, PETITIONER,

vs.

SHOSHONE TRIBE OF INDIANS OF THE WIND RIVER RESERVATION IN WYOMING

ON WRITS OF CERTIORARI TO THE COURT OF CLAIMS

PETITIONS FOR CERTIORARI FILED JULY 22, 1936.
SEPTEMBER 1, 1936.

CERTIORARI GRANTED OCTOBER 19, 1936.

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

COURT OF CLAIMS OF THE UNITED STATES

No. H-219

SHOSHONE TRIBE OF INDIANS OF THE WIND RIVER RESERVATION IN WYOMING

vs.

THE UNITED STATES

I. HISTORY OF PROCEEDINGS

On May 27, 1927, the plaintiff filed its original petition.

On July 6, 1927, the defendant filed a general traverse to said petition.

On September 12, 1931, the plaintiff filed a motion for leave to file an amended petition.

On September 30, 1931, the court allowed said motion and the amended petition was filed, which is as follows:

II. AMENDED PETITION—Filed September 30, 1931

To the Honorable, the Chief Justice and Associate Justices of the Court of Claims:

Your Petitioner, the Shoshone Tribe of Indians of the Wind River Reservation in Wyoming, respectfully represents to the Court:

[fol. 2]

I

It is a tribe of Indians formerly and now in treaty relations with the United States, under the control and guardianship of the United States, and is a resident of the State of Wyoming. Its members now occupy lands in common and in severalty in said State. It brings this suit by virtue of an Act of Congress approved March 3, 1927 (44 Stat. 1349—4 Kappler 937), entitled "An Act Authorizing the Shoshone Tribe of Indians of the Wind River Reservation in Wyoming to submit claims to the Court of Claims," which act is as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress as-

sembled, That jurisdiction be, and is hereby, conferred upon the Court of Claims, with right of appeal to the Supreme Court of the United States by either party, notwithstanding the lapse of time or statutes of limitation, to hear, examine, adjudicate, and render judgment in any and all legal and equitable claims which the Shoshone Tribe of Indians of the Wind River Reservation in the State of Wyoming may have against the United States arising under or growing out of the treaty of July 3, 1868, (Fifteenth Statutes, page 673), or arising under or growing out of any subsequent treaty or agreement between said Shoshone Tribe of Indians and the United States or any subsequent Act of Congress affecting said tribe, which claims have not heretofore been determined and adjudicated upon their merits by the Court of Claims or the Supreme Court of the United States.

[fol. 3] "Sec. 2. The claims of said tribe shall be presented by petition, subject, however, to amendment at any time. The suit under this Act shall be instituted or petition filed in the Court of Claims within three years from the date of approval of this Act. Such suit shall make the Shoshone Tribe of Indians of the Wind River Reservation in Wyoming party plaintiff and the United States party defendant. The petition shall be verified upon information and belief by the attorney or attorneys employed by said tribe to prosecute said claims under contract approved by the Commissioner of Indian Affairs and the Secretary of the Interior. Letters, papers, documents, and public records, or certified copies thereof, bearing upon the claims presented, may be used in evidence; and the departments of Government shall give the attorney of said tribe access to any such letters, papers, documents, or public records and shall furnish certified copies of such thereof as may be deemed material.

"Sec. 3. In said suit the court shall also hear, examine, and adjudicate any claims which the United States may have against said tribe, but any payment, including gratuities which the United States may have made to said tribe, shall not operate as an estoppel, but may be pleaded as an offset in such suit: *Provided, however,* that the United States may interpose to such suit or action any and all pleas of defense, affirmative and negative, legal and equit-

able, which it may have thereto not herein specifically barred by the provisions of this Act. In reference to all [fol. 4] claims which may be the subject-matter of the suits herein authorized, the decree of the court shall be in full settlement of all damages, if any, committed by the Government of the United States and shall annul and cancel all claim, right, and title of the said Shoshone Indians in and to such money, lands, or other property.

"Sec. 4. Upon final determination of such suit or suits the Court of Claims shall have jurisdiction to fix and determine a reasonable fee, not to exceed 10 per centum of the recovery, together with all necessary and proper expenses incurred in preparation and prosecution of the suit, to be paid to the Attorneys employed by said Shoshone Tribe of Indians, and the same shall be included in the decree and shall be paid out of any sum or sums found to be due said tribe.

"Sec. 5. The Court of Claims shall have full authority by proper orders and process to bring in and make parties to said suit any or all persons deemed by it necessary or proper to the final determination of the matters in controversy.

"Sec. 6. A copy of the petition in such suit shall be served upon the Attorney General of the United States, and he, or some attorney from the Department of Justice to be designated by him, is hereby directed to appear and defend the interests of the United States.

[fol. 5] "Sec. 7. All amounts which may be found due and recovered for said tribe under the provisions of this Act, less attorney's fees and expenses, shall be deposited in the Treasury of the United States to the credit of said tribe and shall draw interest at the rate of 4 per centum per annum from the date of the judgment or decree."

II

The Shoshone Tribe of Indians entered into a contract of employment with George M. Tunison, Attorney at Law of Omaha, Nebraska, dated December 14, 1926, under which said Tunison is authorized to represent the Shoshone Tribe of Indians and to file this suit in its behalf. Said contract was duly approved by the Commissioner of Indian

Affairs and the Secretary of the Interior under date of February 17, 1927. Subsequently, with the approval of the Commissioner of Indian Affairs and the Secretary of the Interior, under date of March 19, 1927, said Tunison assigned an interest in said contract to Albert W. Jefferis, Attorney at Law, Omaha, Nebraska, and an interest therein to Charles J. Kappler, Attorney at Law, Washington, D. C.

III

Prior to July 3, 1868, petitioner possessed and occupied a large tract of land consisting of approximately 44,000,000 [fol. 6] acres, situate in Wyoming, Utah, Idaho and Colorado under treaty with the United States dated July 2, 1863 (18 Stat. 685—2 Kappler 848), and was continuously in possession and occupation thereof from 1863 to July 3, 1868.

IV

On July 3, 1868, petitioner and the United States entered into a treaty which was ratified on February 16, 1869 and proclaimed February 24, 1869 (15 Stat. 673—2 Kappler 1020). Articles 1 and 2 in part and Article 11 of said treaty of 1868 are as follows:

"Article 1. From this day forward peace between the parties to this treaty shall forever continue. The government of the United States desires peace, and its honor is hereby pledged to keep it. The Indians desire peace, and they hereby pledge their honor to maintain it."

"If bad men among the whites, or among other people subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs, at Washington City, proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and also re-imburse the injured person for the loss sustained."

[fol. 7] "Article 2. The United States further agrees that the following district of country, to-wit: Commencing at the mouth of Owl Creek and running due south to the crest of the divide between the Sweetwater and Popo-Agie

Rivers; thence along the crest of said divide and the summit of Wind River mountains to the longitude of North Fork of Wind River; thence due north to mouth of said North Fork and up its channel to a point twenty miles above its mouth, thence in a straight line to head-waters of Owl Creek, and along middle of Channel of Owl Creek to place of beginning, shall be and the same is set apart for the absolute and undisturbed use and occupation of the Shoshone Indians herein named, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them; and the United States now solemnly agrees that no persons except those herein designated, and authorized so to do, and except such officers, agents, and employes of the Government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the territory described in this article for the use of said Indians, and henceforth they will and do hereby relinquish all title, claims, or rights in and to any portion of the territory of the United States, except such as is embraced within the limits aforesaid."

"Article 11. No treaty for the cession of any portion of the reservations herein described which may be held in [fol. 8] common shall be of any force or validity as against the said Indians, unless executed and signed by at least a majority of all the adult male Indians occupying or interested in the same; and no cession by the tribe shall be understood or construed in such manner as to deprive without his consent, any individual member of the tribe of his right to any tract of land selected by him, as provided in Article 6 of this treaty."

In consideration of the execution of said treaty of July 3, 1868, petitioner relinquished all of its rights, title and interest in and to the lands confirmed to it by the treaty of July 2, 1863, and purchased and accepted in lieu thereof the lands described in Article 2 of said 1868 treaty. By the express terms of said treaty of 1868, petitioner was granted, and there was set apart for its absolute and undisturbed use and occupation, a defined tract of country in the present State of Wyoming, containing 3,054,182 acres, more or less, which it has, since the year 1868 up

to the present time, held, possessed, occupied and claimed continuously and uninterruptedly, with the exceptions hereinafter referred to when it ceded certain portions to the United States, and with the exception of properties for which petitioner is claiming damages which shall hereinafter be more fully stated, said exception applying to the jurisdictional act of March 3, 1927.

[fol. 9] Your petitioner has at all times duly and in good faith kept each, all and every of the covenants in said treaty of 1868 agreed by it to be observed and performed.

V

Prior to July 3, 1868, that being the date of the treaty between the United States and petitioner and on May 10, 1868, a treaty was entered into (15 Stat. 655—2 Kappler 1012) between the Northern Cheyenne and Northern Arapahoe Indians, and the United States, by the terms of which (Article 2), among other things, said Northern Arapahoes would, within one year from May 10, 1868, attach themselves permanently, either to a portion of the country set apart as a home for the Southern Arapahoe and Cheyenne by treaty of October 28, 1867 (15 Stat. 593—2 Kappler 984), or to a portion of the country set apart as a home for the Brule and other bands of Sioux Indians, with whom said Arapahoes were affiliated, by treaty of April 29, 1868 (15 Stat. 635—2 Kappler 998), all of which was well-known to the United States at the time it entered into said treaty of July 3, 1868 with petitioners,—in fact, all three of said treaties were executed on behalf of the United States by the following named persons, (omitting titles) viz: W. S. Harney, C. C. Augur, Alfred H. Terry, John P. Sanborn and Samuel F. Tappan, and two of said treaties were signed by W. T. Sherman.

[fol. 10] After July 3, 1868 and until and including a portion of the year 1877, the Northern Arapahoe Indians were at war with the United States and petitioner, having refused to attach themselves to any of the country referred to in said treaties of October 28, 1867 and April 29, 1868, but on the contrary, continued all that while to roam at will in Nebraska and Dakota territory, to the great annoyance and danger of the inhabitants thereof and at great expense and trouble to the United States. The Secretary of the Interior, the Secretary of War and the Commis-

sioner of Indian Affairs, being unable to induce said Arapahoes to go, or attach themselves, to a home provided for them by the treaties last aforesaid and having no place provided for them to spend the winter of 1877-1878, said Arapahoes being at that time in a weakened and starved condition with no means of sustenance, by and through acts and orders of executive officers, claiming to act for the United States, arbitrarily and contrary to the recommendations and protests of Generals W. T. Sherman and P. H. Sheridan and other officers and agents of the United States, did in the autumn of 1877, direct and require that said Arapahoe Indians, under escort of United States Army officers and soldiers, be removed and located near, at and upon the Shoshone Reservation aforesaid without first [fol. 11] having obtained the consent of said Shoshone Indians thereto given by tribal council or otherwise. The Arapahoe Indians to the number of about 938 were on or about the month of December, 1877, so as aforesaid, conducted, removed to and placed upon said reservation contrary to petitioner's treaty rights, and they have been ever since, and from year to year, kept, protected and permitted to reside and be upon the reservation lands of petitioner. In this connection, petitioner shows to the Court that when said Arapahoe Indians arrived at or near the lands of said reservation, some of the head men and chiefs of said Arapahoe Tribe came to the reservation headquarters of petitioner, there meeting Chief Washakie, the headman and chief of said Shoshone Tribe, and asked to be permitted to stop and rest on said reservation for a short time, giving as a reason therefor the impoverished, weakened and starved condition of said Arapahoes and their horses. Pursuant to said request Chief Washakie stated to the representatives of said Arapahoe Tribe that they could stay on the reservation and visit for a short time on condition that they leave at the earliest possible moment. By reason of the premises aforesaid, the Shoshones, actuated solely by humane considerations, gave consent that said [fol. 12] Arapahoes could visit and rest on said reservation for a short time, all of which the United States and its officers and agents well knew. After said Arapahoes entered upon said reservation of petitioner, in manner and upon the conditions aforesaid, and after they had been there to visit for a short time, petitioner requested their

removal from said reservation by the United States, and objected to and protested against their further presence there frequently and continuously until March 3, 1927. About February 21, 1878, petitioner specifically objected to the occupation of said reservation, or any part thereof, by said Arapahoes and said protests and objections were communicated by James J. Patten, Indian Agent of the Shoshone Reservation, to the Commissioner of Indian Affairs at Washington, D. C., as follows:

"I have the honor to request instructions relative to the removal of the Northern Arapahoes, under Black Coal, to this reservation, and to say, that a good many of the Shoshones would give a welcome to them. But, there is a large majority of the tribe, including Washakie the chief, and nearly all the leading men, who strongly object to their coming, and of dividing their reservation with any other tribe. The Shoshones did agree, and are still willing to make peace with the Arapahoes, they have nothing to say [fol. 13] against their agent having the charge over the former tribe also, but want them placed on a reservation apart from the Shoshones, and, they give as a reason, that the reservation as it is at present, is none too large for the use of the Shoshones, and furthermore, the Shoshones are afraid that the two tribes will not agree well together, that the Arapahoes would probably ill behave themselves and bring trouble upon the Shoshones.

"Agent Irwin, in his council, held with the Shoshones last fall, told them distinctly that the President had not the remotest thought of placing the Arapahoes on the reservation of the Shoshones—that that was not the design of the Government at all. That all that was desired, was for the Shoshones to make peace with said tribe, and that the department would have a piece of land near the mouth of the Sweetwater set apart for the Arapahoes, and although the agent of the Shoshones should be agent of the Arapahoes also, yet the President did not by any means intend to place the Arapahoes directly upon this reservation. Agent Irwin made the above plain statement to the Shoshones in council last fall, and the Shoshones now understand and believe that the Arapahoes are to be removed hither at once.

"I have been lead to make the foregoing statement from the perusal of the Honorable Commissioner's remarks on

[fol. 14] the 'Removal of the Northern Cheyennes and Arapahoes' (Annual Report of Commissioner of Indian Affairs, 1877, page 19) as follows: 'In a formal council held last month by Agent Irwin with the Shoshones, their consent to the arrangement desired by the Arapahoes was obtained and the removal of the latter is now in progress.'

"Now, certainly there has been a mistake made somewhere as Dr. Irwin wrote to me personally under date of December 6th, 1877, as follows:

(Extract from Agent Irwin's Letter)

"* * * I see that Wm. Welch, and others in Philadelphia, are getting up a scheme to put the Arapahoes on the Shoshone agency. Now, this must not be without the Shoshones are agreed, and even then it is not fair. The Shoshones reservation belongs to them, as much as any man's farm belongs to him, and it is just as fair to say to a white man who has a title to his farm that he shall give another man half of it. Wm. Welch is a good man, but he is always getting his foot in it. But I want you to protect the Shoshones from all incroachments in every direction. The Arapahoes should have a reservation but the Government has no right to filch it off the Shoshones, and I would like you to tell the Shoshones to spurn any such proposition as an outrage upon them and their rights. The President promised the Arapahoes a reservation at [fol. 15] the Red Buttes including the mouth of the Sweetwater, and that is what the Arapahoes wanted, and that the agent of the Shoshones should be their agent, and that is all right, and all the President will ask to have done. I take it for granted that you know of Wm. Welch's meeting in Philadelphia proposing to put the Arapahoes on the Shoshone Reservation and open a mission school."

"Solicitude for the welfare of the Shoshones, as well as for the Arapahoes, has also prompted me to write this letter. The department will readily, I think, observe the necessity for a more perfect understanding of the case of my Indians, than they have yet had, before the Arapahoes are ordered in, thus saving further complication and misunderstanding.

"There was present at the council held by Agent Irwin with the Shoshones, alluded to above—the persons named below:

"Captain E. M. Hayes, U. S. A., commandant Camp Brown; Captain Woodson, U. S. A. Lieuts. S. A. Cherry and H. S. Bishop, U. S. A.; James K. Moore, post trader, Camp Brown; R. B. Grimes, post surgeon, Camp Brown and agency physician, and others—citizens and employees.

"Before closing, I would respectfully state that I heartily indorse the policy of the department to collect several small [fol. 16] tribes together upon one reservation and under one agent and it is with the desire to be able to use my influence for the furtherance of this object, that I now write for instructions.

"I have the honor to be,

Very respectfully, your obt. serv't, James J. Patten,
U. S. Ind. Agt."

In 1877 Lieut. General P. H. Sheridan advised the Secretary of War as follows:

"Headquarters, Mil. Div. Mo.,
Chicago, Mch. 27 1877.

"To the Secretary of War:

"Respectfully forwarded. The Northern Arapahoes, like the Northern Cheyennes, are by association and marriage so closely allied to the Sioux Indians that they can appropriately be considered with them as a part of the same people. I am out-and-out opposed to a union of these Indians with the Shoshones. They are a distinct Indian Nationality, and have always been at war with each other until last fall, when they came together as scouts, with Gen. Crook's command, and patched up some kind of a peace.

"If any change is ever made with this small remnant of Arapahoes, it is my opinion they should go to their friends, [fol. 17] the Southern Arapahoes, to whom they originally belonged, now on the North Canadian in the Indian Territory, at Fort Reno. They have, I think, been heretofore regarded in the appropriations made by Congress as an integral part of the Southern Arapahoes, and have been provided for in appropriations for these people. There are but few objections to their being sent to Fort Reno, and last summer they were anxious to go. They number about 1,500, and are so weak and broken-down as to be easily controlled and well fitted to accept the conditions of civilization and religious influences. If the Indian Department

wish, I will agree to move them south with but little expense and in a satisfactory manner. Otherwise, they should live with the Sioux, their companions for many years, and the provisions made by Congress should be included in the Sioux appropriations.

P. H. Sheridan, Lieut. Gen. Comgd."

The Northern Arapahoes were fully aware of their lack of title, and invalid tenure to the lands they occupied on petitioner's said reservation, and said Northern Arapahoes had full knowledge that petitioner had never consented to admit said Northern Arapahoes amongst them or to share its reservation with them, as is shown by the communication from United States Indian Agent Thomas M. Jones, dated March 20, 1886, reading as follows:

[fol. 18] "Shoshone Agency, Wyo.,
March 30, 1886.

"Hon. Commissioner of Indian Affairs.

SIR:

"I am requested by the leading men of the Arapahoe Indians to state that they feel extremely uneasy in regard to their future prospects in view of a proposed bill before Congress respecting Indian lands.

"They fear that as Washakie, the chief of the Shoshones (so far as they can learn), has never surrendered on behalf of his tribe any of the land rights to them, but has simply given his consent to the Arapahoes living here—and in case of passage of such an act—the law will fix it that this land belongs solely to the Shoshones and hence that they will be left out on this reservation and also the one they came from.

"They beg you to see to it that their tribe, already poorer than either of these two, be not left out in the cold.

"There is no record of the facts of the removal of these Indians in this office and it appears to me to have been done through a Dr. Irwin on the request of the Arapahoes by consent of Washakie, and this I have from the Indians themselves. I beg that you will assure them that they will [fol. 19] get their rights either in this, or the other reservation.

I am sir,

Respectfully, yr, obt. sv't., Thos. M. Jones, U. S. Indian Agt."

Notwithstanding the above protests, and other repeated protests to the same effect, executive officers of the United States, claiming to act for the United States, but without any authority of law forced said Northern Arapahoes upon said reservation and claimed for them equal rights upon and equal use of said reservation with petitioner, including equal use of Shoshone treaty money supplies and other treaty rights, and equal use of all employees provided by said treaty.

Petitioner did not give, and has not given, at the times aforesaid, or at any other time, in council assembled, or otherwise, by vote or signature of a majority of the adult males of petitioner's tribe, or in any other manner, consent to the Northern Arapahoes being permanently located upon said reservation or any part thereof, nor consent that said Arapahoes should come and be upon said reservation for any purpose whatsoever other than to allow them to rest [fol. 20] for a short time, as aforesaid. Petitioner has never admitted said Arapahoes amongst them nor ceded to them any portion of its reservation, or in any manner agreed to share any of its benefits arising from its treaty rights.

At the time said Arapahoes were conducted to and upon petitioner's reservation, as hereinbefore stated, said Arapahoes and the petitioner were, and for generations had been, traditional enemies frequently engaged in war with each other, all of which was known to and fully understood by the United States. Had it not been for the presence of officers and soldiers of the Army of the United States at and on said reservation, petitioner would have expelled said Arapahoe Indians therefrom after they had remained thereon for a short time after the winter of 1877-1878, and after the expiration of one year from the time said Arapahoes came on said reservation. At no time have the Shoshones ever consented to admit said Arapahoes into any joint council, nor have the Shoshones participated in any manner, of their own volition, with said Arapahoes, or consented to their presence at any council attended by the petitioner. There has been no amalgamation of the two tribes, no marriages or adoptions of Arapahoes as blood brothers, or otherwise, by petitioner; said tribes do not [fol. 21] speak the same language, and differ widely in habits and attributes, seldom associating with each other. Not only did petitioner protest at the time said Arapahoes were placed upon said reservation, but they specifically

protested in 1891 and again in 1894, when the United States attempted to obtain from it a cession of land; again when the agreement of 1896 was entered into; again when the agreement of 1904 was entered into, and has frequently and continuously, up to the date of the jurisdictional act, to-wit: March 3, 1927, demanded of the United States that said Arapahoes be removed from said reservation and that all lands belonging to petitioner be restored to petitioner. Petitioner protested against the appropriation of its funds and property, as aforesaid, for the use and benefit of the United States or for the use and benefit of said Arapahoes, and against sharing any of the rights and benefits of said reservation and treaty stipulations and agreements with said Arapahoes or anyone else. The United States has refused, and continues to refuse, to remove said Arapahoes from petitioner's reservation; has refused, and continues to refuse, to restore the lands and treaty rights withheld by the United States from petitioner; has refused, and continues to refuse, to pay to petitioner all moneys arising [fol. 22] from the sale and lease of its treaty lands; but on the other hand, the United States has elected, by and through the terms of said jurisdictional act, that as to all claims which are the subject-matter of this suit, the decree of the Court shall be in full settlement of all damages committed by the Government of the United States, and that such decree shall annul and cancel all claims, rights and title of the said Shoshone Indians in and to moneys, lands and other property rights of the Shoshones in said reservation, being the subject-matter of this suit, and to appropriate said moneys, lands and other properties of its use and benefit as in eminent domain.

VI

Petitioner avers that it and the United States entered into the several agreements referred to in this paragraph at the times, under the conditions and for the considerations in this paragraph stated, to-wit:

(a) An agreement dated September 26, 1872, ratified and confirmed by Act of Congress approved December 15, 1874, (18 Stat. 291—1 Kappler 153), under which the defined reservation granted petitioner under the 1868 treaty was confirmed, and by reason of the fact, as set forth in [fol. 23] said agreement, that "mines had been discovered

and citizens of the United States had made improvements within the limits of said reservation," the United States obtained from petitioner a cession of a portion of the reservation embracing such mining districts by changing the southern line of said original reservation.

(b) An agreement dated April 21, 1896, ratified and confirmed by Act of Congress approved June 7, 1897 (30 Stat. 62—1 Kappler 624), whereby petitioner ceded a certain described tract of land ten miles square at the northeast corner of said reservation embracing the Big Horn Hot Springs. Said agreement was negotiated by Inspector James McLaughlin, United States Indian Inspector, on the part of the United States and the Shoshone and Arapahoe Tribes at a council held at the Shoshone Agency Council Room on said reservation on April 20 and 21, 1896. During the holding of said council, a controversy arose between the two tribes. Said Inspector stated that the great Father (United States) wished the Arapahoes to take part in the agreement, whereupon the petitioner acquiesced therein under protest, upon the condition that a provision would be inserted in the agreement reserving to it its treaty rights, but for which agreement to so insert said reservation, peti- [fol. 24] tioner would not have signed the same. Pursuant thereto, and for the purpose of reserving to the petitioner all of its rights under the 1868 treaty a clause was inserted in said agreement, as follows:

"Art. 4. Nothing in this agreement shall be construed to deprive the Indians of any annuities or benefits to which they are entitled under existing agreements or treaty stipulations."

(c) An agreement dated April 21, 1904 ratified and confirmed by Act of Congress approved March 3, 1905 (33 Stat. 1016—3 Kappler 117). Articles 1, 2 and 9 read in part as follows:

"Article 1. The said Indians belonging on the Shoshone or Wind River reservation, Wyoming, for the consideration hereinafter named, do hereby cede, grant and relinquish to the United States, all right, title and interest which they may have to all the lands embraced within the said reservation, except the lands within and bounded by the following described lines: Beginning in the mid-channel of the Big

Wind River at a point where said stream crosses the western boundary of the said reservation; thence in a southeasterly direction following the mid-channel of the Big Wind River to its conjunction with the Little Wind or Big Popo-Agie River, near the northeast corner of township one south, range four east; thence up the mid-channel of [fol. 25] the said Big Popo-Agie River in a southwesterly direction to the mouth of the North Fork of the said Popo-Agie River; thence up the mid-channel of said North Fork of the Big Popo-Agie River to its intersection with the southern boundary of the said reservation, near the southwest corner of section twenty-one, township two south, range one west; thence due west along the southern boundary of the said reservation to the southwest corner of the same; thence north along the western boundary of said reservation to the place of beginning; Provided, That any individual Indian, a member of the Shoshone or Arapahoe tribes, who has, under existing laws or treaty stipulations, selected a tract of land within the portion of said reservation hereby ceded, shall be entitled to have the same allotted and confirmed to him or her, and any Indian who has made or received an allotment of land within the ceded territory shall have the right to surrender such allotment and select other lands within the diminished reserve in lieu thereof at any time before the lands hereby ceded shall be opened to entry.

"Article 2. In consideration of the lands ceded, granted, relinquished and conveyed by Article 1 of this agreement, the United States stipulates and agrees to dispose of the same as hereinafter provided, under the provisions of the homestead, townsite, coal and mineral land laws, or by sale for cash, as hereinafter provided * * * and the United States agrees to pay the said Indians the proceeds derived from the sales of said lands the amount so realized to be [fol. 26] paid to and expended for said Indians in the manner hereafter provided."

"Article 9. It is understood that nothing in this agreement contained shall in any manner bind the United States to purchase any portion of the lands herein described or to dispose of said lands except as provided herein, or to guarantee to find purchasers for said lands or any portion thereof, it being the understanding that the United States shall act as trustee for said Indians to dispose of said lands and

to expend for said Indians and pay over to them the proceeds received from the sale thereof only as received, as herein provided."

That agreement was the result of a council held at the Shoshone Agency on said reservation on April 19, 20 and 21, 1904, at which said James McLaughlin, Indian Inspector as aforesaid, represented the United States and at which meeting Shoshones and Arapahoes were present.

In the meeting on April 19th, said Inspector made the following statement:

"My desire is that my words shall be conveyed to you people clearly and fully, and that your words shall be conveyed to me in the same manner."

Following the foregoing statement there was a general [fol. 27] discussion among those present, after which said council was adjourned until April 20, 1904. At the meeting on April 20th, pursuant to adjournment, after the question of an agreement had been discussed at considerable length by members of the Arapahoe Tribe, said Inspector said:

"We are now ready to listen to the Shoshones, and would like to hear from all who have anything to suggest."

Whereupon, George Terry, one of the head men and a member of, and spokesman for, the Shoshone Tribe at said council, stated:

"First and foremost, we must protest against having the Arapahoes in council with us."

Thereupon said Inspector and Henry E. Wadsworth, United States Indian Agent for said reservation, who was also present and participated in said council, stated to those present, including the Shoshones, that:

"A formal objection and protest on the part of the Shoshones and a reservation of all their treaty rights inserted in the agreement would protect them in their claim to sole ownership of the reservation."

[fol. 28] Whereupon said Shoshones acquiesced in the presence of said Arapahoes at said council, but only upon the conditions aforesaid, and thereafter, all meetings held and actions taken were with the understanding that the

Shoshones did not in any degree recede from their position of claimants as sole owners of the Shoshone Reservation.

The meeting of April 20th was adjourned to the following day, to-wit: April 21st. The council re-convened on April 21st, whereupon said Inspector made the following statement:

"I have prepared the agreement with great care and your interests are fully protected by it, as I promised you yesterday."

Again:

"The agreement has been clearly read to you and interpreted, and it is strictly in accordance with the conclusions we reached yesterday, and I now ask you: Are you ready to accept it?"

At said meeting of April 21st, said Inspector presented to petitioner a fully prepared written agreement, prepared and dictated by him, stating that said agreement was [fol. 29] strictly in accordance with the agreements and stipulations hereinbefore agreed to be entered therein. Article 10 of said agreement so prepared was, as follows:

"Art. 10. It is further understood that nothing in this agreement shall be construed to deprive the said Indians of the Shoshone or Wind River reservation, Wyoming, of any benefits to which they are entitled under existing treaties or agreements not inconsistent with the provisions of this agreement."

Petitioner did not read nor fully understand the meaning of said Article 10, but believed that said Article 10 did embody the agreements to be put therein, as hereinbefore stated. Said reservation so inserted did not comply with the agreements between petitioner and said Inspector, but on the contrary contained at the foot of said Article 10, the words: "not inconsistent with the provisions of this agreement." Your petitioner understood said reservation, as contained in said written contract, was intended to and did in fact reserve to and fully protect it, in all of its rights of every character and kind under said 1868 treaty, and would not have signed said agreement had it known and understood said reservation in any different sense.

[fol. 30] VII

The agreement of April 21, 1904, ratified and confirmed by Act of Congress approved March 3, 1905, (33 Stat. 1016—3 Kappler 117), was the result of the council meetings of April 19, 20 and 21, 1904 at which Harry E. Wadsworth, United States Indian Agent at the Shoshone Reservation, was present and participated. At the opening of the meeting of the council Agent Wadsworth introduced Inspector McLaughlin, who had negotiated the 1896 agreement with the Indians, using the following language:

"Washington has sent an old friend to talk to you. He is a man who probably knows more about Indians than any other person. He has spent most of his life, and it has been a long one, working with the Indians. He understands them and understands what they need. That is the reason Washington has sent him here, and also because he understands just what you ought to have. He has come here to find out what you Indians want to do about the sale of some of your lands. Whatever he will tell you will be just right. He will do right for you, and everything he says will be best for you. That is all I have to say. A great many of your people know him and know that he understands this business, and now I will let him talk to you. This is [fol. 31] Major McLaughlin, an old friend of the Indians."

During said councils with the Indians, Inspector McLaughlin made the following statements to them:

(1) "The President and the Secretary of the Interior are desirous to have you sell your surplus lands and open them to settlement as much so as Congress, but at the same time, they are desirous to see that the Indians have full compensation for such lands ceded to the Government. For several years past there has been a sentiment in Congress, and one that is growing stronger each succeeding year, opposed to paying the Indians a lump sum consideration for their lands. Instead of stipulating, or providing in the agreement, a lump sum consideration for any tract of land, they have determined upon giving the Indians the full benefit of the land by paying the Indians from the proceeds of the sale of the land as white men settle upon it."

(2) "While we can not say just what the Indians will receive under this new policy, as we could under the old system, they will receive more in the aggregate than under the old lump-sum agreements."

(3) "My friends, that you may understand better and more clearly, the Governement as guardian is trustee for [fol. 32] the Indians, acting for the Indians, selling the lands for them, collecting for the same and paying the proceeds to the Indians at such times, and in the manner as may be stipulated in the agreements, and this, without any cost to the Indians."

(4) "My friends, the timber on your reservation, of course, goes with the land, and your lands up in the mountains are of little value without it. The timber enhances the value of your lands in the mountains. These will probably come under the class of lands that will be disposed of after the homesteads, as people will hardly go up there to file homesteads, although the law permits them to do so. You will therefore get whatever these lands bring. You will receive for your coal and mineral lands the price provided for that class of lands by law. They are worth probably $10.00 per acre now, but will be worth $20.00 per acre when the railroad comes. There is a law governing the price of your mineral lands, and you will get that price for them. Therefore I can make no provision for additional compensation for your timber."

It was at this meeting that George Terry made the protest under the circumstances and conditions set forth in Paragraph VI above. Following the foregoing statements, [fol. 33] Inspector McLaughlin recited what cash was to be paid under said agreement, the money payments aggregating $335,000.00. Said agreement was signed, as hereinbefore stated, on April 21, 1904.

Petitioner avers that it understood from the terms of said agreement and the statements so as aforesaid made by said Inspector McLaughlin, that it was to have the full and complete interest in all lands described therein and it would be paid for the full value thereof, including timber, oil, coal and other minerals, and understood that the United States would act as trustee for it as cestui que trustent, as well as under the terms of said 1868 treaty, and relying

on such statements so made by said Inspector McLaughlin and the terms of said agreement, as interpreted to it by said Inspector, it entered into said agreement and signed the same.

Subsequent thereto, the Congress of the United States ratified said agreement by the Act approved March 3, 1905 without any modification whatsoever concerning the statements and things referred to in this paragraph.

In this connection, petitioner shows to the court that the United States did not comply with the terms of said agree- [fol. 34] ment by it to be performed, but on the contrary withdrew said lands from entry and sale, but has continued to hold the same in trust for this petitioner until the passage of the Act of March 3, 1927, at which time the United States took and appropriated to its use and to public use an undivided one-half of the properties referred to in said agreement, so held in trust, and which constitute a part of the subject-matter of this suit.

VIII

By the Act of Congress approved August 21, 1916, (39 Stat. 519—4 Kappler 93), Congress acknowledged and ratified the claim of the petitioner herein that it had the sole right and title to the whole of the moneys arising from the sale and lease of lands granted to it under the 1868 treaty.

Section 1 of said Act provided:

"That the Secretary of the Interior is hereby authorized and empowered to lease, for the production of oil and gas therefrom, lands within the ceded portion of the Shoshone or Wind River Indian reservation in the State of Wyoming, under such terms and conditions as shall be by him prescribed; and the proceeds or royalties arising from any such leases shall be first applied to the extinguishment of any indebtedness of the Shoshone Indian tribe to the United [fol. 35] States and thereafter shall be applied to the use and benefit of said tribe in the same manner as though secured from the sale of said lands as provided by the act of Congress approved March 3, 1905."

IX

A. Article 2 of the treaty of 1868 provides:

"The United States now solemnly agrees that no persons except those herein designated, and authorized so to do, and except such officers, agents, and employes of the Government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon or reside in the territory described in this article for the use of said Indians, and henceforth they will and do hereby relinquish all title, claim or rights in and to any portion of the territory of the United States, except such as is embraced within the limits aforesaid."

Notwithstanding this solemn treaty stipulation, and with the knowledge on the part of the United States that certain portions of the lands within the limits of petitioner's reservation contained valuable deposits of gold, and other precious metals, the United States permitted and encour- [fol. 36] aged citizens of the United States, against the protest of petitioner, to intrude, settle, reside upon, and mine and take away large amounts of gold belonging to petitioner to the loss and damage of petitioner in the sum of $1,106,750.00.

B. In further violation of said Article 2 of the treaty of 1868 and in violation of the express covenant and agreement of the United States to protect the interests and rights of petitioner in and to said reservation, the United States, with full knowledge of the aforesaid situation and conditions, permitted many thousands of cattle, horses and other livestock not owned by petitioner, nor belonging or having any right to be on said reservation, annually to go upon, graze and range on and over said reservation and consume and destroy the grass and crops and food stuffs thereon belonging to petitioner, from and during the years 1873 to 1894, both inclusive, (after which time the United States recognized its duties and obligations in that regard and put an end to such trespassing) of the value of $40,000 per year and a total value of $840,000. For the years 1873 to 1877, both inclusive, five years, petitioner sustained the entire loss and damage, viz: $40,000 per year, amounting to $200,000, and for the years 1878 to 1894, both inclusive,

[fol. 37] seventeen years, petitioner sustained one-half of said loss and damage, amounting to $20,000 per year, or a total of $340,000. The total loss and damage sustained by petitioner during said periods amounted to $540,000.

C. In addition to the provisions quoted from Article 2 aforesaid, said treaty of 1868 gave to petitioner the exclusive right to hunt on said reservation for their living and sustenance; that said exclusive right to hunt thereon was protected in said treaty, not only by said Article 2 above quoted, but by the further provision therein that said petitioners should make said reservation their permanent home, and make no permanent settlement elsewhere, and by the further provision that said reservation "is set apart for the absolute and undisturbed use and occupation of" the petitioner. In further violation of said treaty, and in violation of the express covenants and agreements of the United States to protect the interest and rights of petitioner in and to said reservation, the United States, with full knowledge of the situation and conditions, after having been expressly requested to prevent such unauthorized and illegal hunting and destruction of game, permitted the members of said Arapahoe Tribe of Indians and other Indians and white persons to encroach [fol. 38] and trespass upon said reservation and to hunt, kill and destroy the wild game which customarily roamed upon and over said reservation and made its home thereon; said reservation had, from the earliest knowledge thereof by both Indians and white men, been a land of plenty with respect to game; by reason of its well-watered and well-grassed condition, said reservation was a favorite grazing and ranging ground for all kinds of wild game animals in great abundance, such as meat and fur-bearing animals,—buffalo, elk, deer, antelope and bear; also fur-bearing animals, such as beaver, martin and mink. For many years such wild game and fur-bearing animals were sufficiently abundant and available to petitioner to supply it and its members with all the animal food and materials for clothing and tent making, sale and profit therefrom to more than support them in comfort and to supply all of their needs for comfortable living. After said Arapahoes were forced upon said reservation, as in this amended petition set forth, they, other Indians and white persons were so

permitted to trespass and go upon said reservation and hunt, kill, destroy and frighten away from said reservation great quantities of game and fur-bearing animals as to greatly destroy the use thereof by petitioner for the [fol. 39] purposes hereinbefore stated, and to such an extent that petitioner was damaged in the capital sum of $2,025,000.00, and in the loss of game in the further sum of $2,430,000.00, a total of $4,455,000.00.

X

In 1869 the United States deemed it necessary and proper to place soldiers upon said reservation, and to that end requisitioned and took over several thousand acres of land thereon and established thereon the military post of Camp Brown, later designated as Fort Washakie, for military uses and purposes. Several companies of cavalry were stationed at said military post, where they remained continuously up until the year 1909, when said military reservation was abandoned. During the time said military post was occupied, as aforesaid, the commanding officers in charge thereof annually requisitioned and commandeered, for public use and for the use of said cavalry, wood at the rate of 1519 cords and hay at the rate of 516 tons; that the reasonable value of the wood so requisitioned and commandeered and delivered to said cavalry and used by it was the sum of $759.50 per year; that the reasonable value of [fol. 40] the hay so requisitioned and commandeered and delivered to said cavalry and used by it was the sum of $316.00 per year; that the total value of the wood so furnished and used for said period of 40 years was the sum of $30,380.00; that the total value of the hay so furnished and used for said period of 40 years was the sum of $12,640.00. The total value of said wood and hay for said period was $43,020.00, and interest as damages on said sum, from the respective dates of taking to the date of the jurisdictional act herein, at seven per cent per annum, amounts to $58,500.00.

By reason of the taking of said wood and hay as aforesaid, plaintiff has been damaged in the sum of $101,520.00, no part of which has ever been paid by the United States, nor has the plaintiff received any compensation therefor.

XI

The executive officers of the United States, in manner hereinbefore stated and described, settled, incorporated, and allotted, for the use and benefit of the United States and for the public use, the Northern Arapahoe Tribe of Indians on said reservation, and likewise appropriated, expended and made use of large sums of money and large [fol. 41] amounts of property including an undivided one-half interest in all tribal lands belonging to petitioner, all without petitioner's consent and without any compensation having been paid therefor, and all in violation of said 1868 treaty; in violation of the General Allotment Act approved February 8, 1887, as amended by Act of Congress approved February 28, 1891 (26 Stat. 794—1 Kappler 56); in violation of the agreement of April 21, 1896 and the Act of Congress confirming same approved June 7, 1897 (30 Stat. 62—1 Kappler 624); in violation of the agreement of April 21, 1904 and the Act of Congress confirming same approved March 3, 1905 (33 Stat. 1016—3 Kappler 117), and in violation of the Fifth Amendment to the Constitution of the United States.

By the Act of Congress approved March 3, 1927, (44 Stat. 1349), the United States, with full knowledge and understanding of the acts of its executive officers and agents, as in this amended petition enumerated and complained of, in the exercise of its sovereign power of eminent domain, ratified, adopted and assumed responsibility for said several acts of its said executive officers and agents, and for the first time made provision for the payment of [fol. 42] the damages suffered therefrom by petitioner, and for the first time authorized said petitioner to bring suit therefor and to recover thereon.

XII

From and after March 3, 1927, the date of the passage and approval of the jurisdictional act under which this suit was begun, the United States, by and through acts of Congress and its executive officers and with the consent and acquiescence of petitioner, have continued to hold, occupy, use and assert proprietorship and ownership for itself and on behalf of said Arapahoe Indians the full title and right to use and occupy all of said Arapahoe allot-

ments, the right of the use and joint occupancy of said Arapahoes with petitioner on the tribal lands on said reservation, and the right to divide and participate with the Shoshones in the rentals, lease moneys and facilities of said reservation, and has wholly excluded said Shoshones from said allot-ed lands and has excluded said Shoshones from an undivided one-half interest, right or claim in and to all of the tribal lands on said reservation.

[fol. 43] XIII

Petitioner, under the Act of March 3, 1927, makes the following legal and equitable claims for damages which it has suffered by acts of the United States, in this amended petition set forth, arising under and growing out of the treaty of July 3, 1868 (15 Stat. 673), and arising under and growing out of subsequent agreements between said plaintiff and the United States, and Acts of Congress affecting said tribe, which claims have not heretofore been determined and adjudicated upon their merits by the Court of Claims or the Supreme Court of the United States, which said petitioner asks this Court to hear, examine, adjudicate and render judgment upon according to said Act of Congress, that is to say:

[fol. 44] (1) Use and Occupation of Tribal Lands

One-half of the value of the use and occupation of reservation tribal lands for the years, number of acres and amounts following:

Years	Acres	Amounts
1877-1896	2,343,540	$3,058,319.50
1896-1907	2,288,500	1,825,078.50
1907-1915	2,063,596	1,271,175.00
1915-1927	2,040,010	1,626,907.50
		$7,781,480.50
Interest on above at 7% per annum as damages to March 3, 1927, as a part of compensation		7,267,860.00
Total		$15,049,340.50

[fol. 45] (2) Use and Occupation of Arapahoe Allotments

Use and occupation of allotments to Arapahoes on said reservation for the years, number of acres and amounts following:

Years	Acres	Amounts
1907-1927	93,787.12	$2,119,586.00
1915-1927	10,579.34	131,496.00
Total	104,366.46	$2,251,082.00
Interest on above at 7% per annum as damages to March 3, 1927, as a part of compensation		1,455,400.00
Total		$3,706,482.00

(3) Moneys

Balance of moneys belonging to Shoshones wrongfully appropriated by the United States to its use, up to June 30, 1927, $968,863.90.

(4) Value Arapahoe Allotments

Value of lands on said reservation acquired as of March 3, 1927, allotted to Arapahoes (104,366.46 acres), $1,690,-619.00.

[fol: 46] With interest thereon at 7% per annum from March 3, 1927, as a part of compensation.

(5) Value Tribal Lands

Value of an undivided one-half of the unallotted lands on said reservation acquired as of March 3, 1927, for agriculture, grazing, timber, gas, oil, coal, minerals, reservoirs and water power (2,040,010 acres), $9,531,704.50.

With interest thereon at 7% per annum from March 3, 1927 as a part of compensation.

(6) Gold

Value of gold removed from petitioner's reservation by citizens of the United States with the permission and encouragement of the United States, as more specifically

stated in Paragraph IX (A) of this amended petition, $1,106,750.00.

(7) Trespass

Damage sustained by petitioner by trespass on said reservation with the knowledge and permission of the United States, as more particularly stated in Paragraph IX (B) of this amended petition, $540,000.00.

[fol. 47] (10) Game

Damage to petitioner for the destruction of game and the loss of game on said reservation, as more particularly described in Paragraph IX (C) of this amended petition, $4,455,000.00.

(11) Wood and Hay

Damage to petitioner for wood and hay requisitioned and used by the United States for military post on said reservation, as more particularly described in Paragraph X of this amended petition $43,020.00
Interest on said sum at 7% per annum as damages to March 3, 1927, as a part of compensation 58,500.00

Total $101,520.00

XIV

No assignment or transfer of any of petitioner's claims made herein, or any part thereof, or interest therein, has been made, except as stated in this petition, and petitioner is justly entitled to the amounts claimed from the United States, after allowing all just credits and offsets. Petitioner has at all times borne true allegiance to the Government of the United States and has not in any way vol-[fol. 48] untarily aided, abetted or given encouragement to rebellion against said Government. Petitioner believes the facts stated in this amended petition to be true.

XV

Petitioner alleges that the jurisdictional act under which this suit is instituted provided the first and only right and

remedy Petitioner has had to demand damages for the wrongful acts committed by the defendant, the United States of America, said act providing:

"In reference to all claims which may be the subject matterof the suits herein authorized, the decree of the court shall be in full settlement of all damages, if any, committed by the Government of the United States and shall annul and cancel all claim, right, and title of the said Shoshone Indians in and to such money, lands, or other property."

Petitioner further alleges that the direct loss and damages resulting to it arising under and growing out of the acts hereinbefore complained of, and for which the United States has paid to the petitioner no compensation or damage whatsoever, are as follows:

[fol. 49]

1. Use and occupation of tribal lands, including interest (See Par. XIII (1) this Amended Petition)	$15,049,340.50
2. Use and occupation of Arapahoe allotments, including interest (See Par. XIII (2))	3,706,482.00
3. Shoshones' moneys wrongfully diverted, with interest thereon at 7% per annum from March 3, 1927 (See Par. XIII (3))	968,863.90
4. Value of Arapahoe allotments, with interest thereon at 7% per annum from March 3, 1927, (See Par. XIII (4))	1,690,619.00
5. Value of undivided one-half tribal lands, with interest thereon at 7% per annum from March 3, 1927, (See Par. XIII (5))	9,531,704.50
6. Gold (See Par. XIII (6))	1,106,750.00
7. Trespass (See Par. XIII (7))	540,000.00
8. Game (See Par. XIII (8))	4,455,000.00
[fol. 50] 9. Wood and hay for military reservation, including interest (See Par. XIII (9))	101,520.00
Total	$37,150,279.90

Wherefore, and by reason of the premises aforesaid, the Shoshone Tribe of Indians of the Wind River Reservation

in Wyoming sues the United States of America for damages and compensation and final accounting and settlement, as provided in the jurisdictional act of March 3, 1927, and claims of the United States that there is due said tribe the sum of $37,150,279.90, together with interest on portions thereof from March 3, 1927, and such additional amount as the court upon an accounting may find to be legal and equitable claims; and prays this Court to render judgment in favor of petitioner and against the defendant, the United States of America, in the sum of $37,150,279.90, and such additional sums as from a full and final accounting shall be found due, and for such other and further relief as may be proper, both at law and in equity. Petitioner further prays that the court decree the fee or fees to be paid to the attorneys representing petitioners, and all necessary and proper expenses and costs incurred in the preparation and prosecution of this suit, as provided by the jurisdictional act, and the contract [fol. 51] executed in pursuance thereof, and that the same be ordered paid to the persons entitled thereto.

The Shoshone Tribe of Indians of the Wind River Reservation, in Wyoming, By its Attorney of Record, George M. Tunison. Charles J. Kappler, Albert W. Jefferis, Of Counsel.

[fol. 52] *Duly sworn to by George M. Tunison. Jurat omitted in printing.*

[fol. 53] III. General Traverse—Filed November 9, 1931

And now comes the Attorney General, on behalf of the United States, and answering the amended petition of the plaintiff herein, denies each and every allegation therein contained; and asks judgment that the amended petition be dismissed.

Charles B. Rugg, Assistant Attorney General.

IV. Argument and Submission of Case

On December 5, 1933, this case was argued and submitted on merits by Mr. George M. Tunison and Mr. Albert W. Jefferis, for plaintiff, and by Mr. Charles H. Small, for defendant.

[fol. 54]

V. Special Findings of Fact, Conclusion of Law and Opinion of the Court by Littleton, J.—Filed December 2, 1935

Mr. George M. Tunison and Mr. Albert W. Jefferis for the plaintiff.

Mr. Charles J. Kappler and Mr. Francis S. Howell were on the brief.

Mr. Charles H. Small and Mr. George T. Stormont for the defendant.

Mr. William W. Scott was on the brief.

Plaintiff sues to recover a total of $37,150,279.90, together with interest on certain amounts. The amounts making up the total sued for arise out of the claim that the treaty with plaintiff made July 3, 1868, was violated by officials of the United States by placing the Northern Band of Arapahoe Indians on the Shoshone Reservation in Wyoming when the plaintiff tribe was not willing that such Indians be settled permanently on the reservation and that the consent of the plaintiff tribe and the United States to such an arrangement was not obtained, as required by the treaty. Plaintiff, therefore, contends that the Congress, by the Jurisdictional Act of March 3, 1927, ratified the acts of the officials of the United States and by that act took an undivided one-half interest in the reservation by the permanent settlement thereon of the Northern Arapahoe Indians with equal rights with plaintiff tribe, and that the United States is liable under the treaty of 1868, and various agreements subsequently made, to compensate plaintiff for (1) shortage of treaty disbursements; Shoshone Treaty funds disbursed for benefit of the Arapahoes, and monies derived from the reservation under various agreements and the acts of March 3, 1883, and August 21, 1916, wrongfully diverted to the use of the Arapahoe Indians, $968,863.90; (2) use and occupation by Arapahoes of plaintiff's tribal lands prior to allotments, $15,049,340.50; (3) use and occupation of Arapahoe allotments of lands from 1907 and 1915 to 1927, including interest, $3,706,482; (4) value on March 3, 1927, of 104,366.46 acres of land allotted to the Arapahoe Indians, $1,690,619; (5) value on March 3, 1927, of an undivided one-half of tribal lands, $9,531,704.50; (6) value of gold mined and removed

from the reservation by unauthorized persons, $1,106,750; [fol. 55] (7) trespass—in permitting livestock not owned by plaintiff, nor having any right to be on the reservation, to go upon, graze, and range on or over the reservation, thus destroying the grasses, crops, and foodstuffs belonging to plaintiff between 1873 and 1894, of the value of $540,000; (8) destruction of game, $4,455,000; and (9) value of hay and wood taken and removed from the reservation and used for Government purposes at its military post located upon the Shoshone Reservation, $101,520.

Counsel for the defendant contend that the Northern Arapahoe Indians were rightly placed and settled upon the Shoshone or Wind River Reservation on March 18, 1878, and have ever since been rightly upon the reservation, for the reason that before and at the time the Arapahoes were brought to and placed upon the reservation Chief Washakie and the Shoshone Indians expressed their willingness to admit the Arapahoes amongst them, and that the Shoshones and the United States consented to this arrangement in sufficient compliance with art. 2 of the Shoshone Treaty of 1868. It is insisted, therefore, that plaintiff has no claim for compensation from the United States. Counsel for defendant further contend that even if the Shoshone Indians were not willing to admit the Arapahoes amongst them and did not consent thereto when the Arapahoes were brought upon the reservation or at any time thereafter, and if the United States did not consent thereto in the required manner, the plaintiff is not entitled to recover any amount for the reason that the date of the taking of a one-half interest in the Shoshone Reservation for the benefit of the Arapahoe Indians occurred March 18, 1878, and not on March 3, 1927, as contended by plaintiff, and that the fair and reasonable value of 1,171,770 acres, being one-half of the lands embraced in the reservation on March 18, 1878, was $46,000 and the offsets which the Government is entitled to charge against the plaintiff under the Jurisdictional Act amount to $2,947,747.05.

Special Findings of Fact

1. On July 2, 1863, plaintiff tribe of Indians and the United States entered into a treaty, 18 Stat. 685, which set apart for plaintiff a reservation of 44,672,000 acres located in Colorado, Utah, Idaho, and Wyoming in consid-

eration of certain matters mentioned in the treaty. The United States agreed to pay to the tribe annually for twenty years the sum of $10,000 in such amounts as the President might deem suitable for their wants or conditions, either as hunters or herdsmen.

2. By treaty of July 3, 1868, 15 Stat. 673, plaintiff gave up and relinquished this reservation to the United States and accepted in lieu thereof the present reservation, consisting originally of 3,054,182 acres in the State of Wyoming, together with the agreement of the United States to deliver at the agency house on the reservation annually for thirty years, in lieu of all sums of money or other annuities provided to be paid under any and all treaties theretofore made, certain articles of clothing and other supplies, and to construct certain buildings upon the reservation and furnish certain employees and instructors for the Indians, together with a school and a teacher. The important provisions of this treaty were as follows:

[fol. 56] Article 1. From this day forward, peace between the parties to this treaty shall forever continue. The Government of the United States desires peace, and its honor is hereby pledged to keep it. The Indians desire peace, and they hereby pledge their honor to maintain it. If bad men among the whites, or among other people subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs at Washington City, proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and also reimburse the injured person for the loss sustained.

"If bad men among the Indians shall commit a wrong or depredation upon the person or property of any one, white, black, or Indian, subject to the authority of the United States, and at peace therewith, the Indians herein named solemnly agree that they will, on proof made to their agent and notice by him, deliver up the wrong-doer to the United States, to be tried and punished according to its laws; and in case they willfully refuse so to do, the person injured shall be reimbursed for his loss from the annuities or other moneys due or to become due to them under this or other treaties made with the United States. And the President, on advising with the Commissioner of Indian Affairs, shall

prescribe such rules and regulations for ascertaining damages under the provisions of this article as in his judgment may be proper. But no such damages shall be adjusted and paid until thoroughly examined and passed upon by the Commissioner of Indian Affairs, and no one sustaining loss while violating or because of his violating the provisions of this treaty or the laws of the United States, shall be reimbursed therefor.

"Article 2. * * * The United States further agrees that the following district of country, to-wit: Commencing at the mouth of Owl Creek and running due south to the crest of the divide between the Sweetwater and Papo Agie Rivers; thence along the crest of said divide and the summit of Wind River Mountains to the longitude of North Fork of Wind River; thence due north to mouth of said North Fork and up its channel to a point twenty miles above its mouth; thence in a straight line to head-waters of Owl Creek and along middle of channel of Owl Creek to place of beginning, shall be and the same is set apart for the absolute and undisturbed use and occupation of the Shoshone Indians herein named, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them; and the United States now solemnly agrees that no persons except those herein designated and authorized so to do, and except such officers, agents, and employes of the Government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the territory described in this article for the use of said Indians, and henceforth they will and do hereby relinquish all title, claims, or rights in and to any portion of the territory of the United States except such as is embraced within the limits aforesaid.

* * * * * * *

[fol. 57] "Article 4. The Indians herein named agree, when the agency house and other buildings shall be constructed on their reservations named, they will make said reservations their permanent home, and they will make no permanent settlement elsewhere; but they shall have their right to hunt on the unoccupied lands of the United States

so long as game may be found thereon, and so long as peace subsists among the whites and Indians on the borders of the hunting districts.

"Article 5. The United States agrees that the agent for said Indians shall in the future make his home at the agency building on the Shoshone Reservation, but shall direct and supervise affairs on the Bannack Reservation, and shall keep an office open at all times for the purpose of prompt and diligent inquiry into such matters of complaint by and against the Indians as may be presented for investigation under the provisions of their treaty stipulations, as also for the faithful discharge of other duties enjoined by law. In all cases of depredation on person or property he shall cause the evidence to be taken in writing and forwarded, together with his finding, to the Commissioner of Indian Affairs, whose decisions shall be binding on the parties to this treaty.

* * * * * * *

"Article 7. In order to insure the civilization of the tribes entering into this treaty, the necessity of education is admitted, especially of such of them as are or may be settled on said agricultural reservations, and they therefore pledge themselves to compel their children, male and female, between the ages of six and sixteen years, to attend school; and it is hereby made the duty of the agent for said Indians to see that this stipulation is strictly complied with; and the United States agrees that for every thirty children between said ages, who can be induced or compelled to attend school, a house shall be provided and a teacher competent to teach the elementary branches of an English education shall be furnished, who will reside among said Indians and faithfully discharge his or her duties as a teacher. The provisions of this article to continue for twenty years.

"Article 8. * * * And it is further stipulated that such persons as commence farming shall receive instructions from the farmers herein provided for, and whenever more than one hundred persons on either reservation shall enter upon the cultivation of the soil, a second blacksmith shall be provided, with such iron, steel, and other material as may be required.

"Article 9. In lieu of all sums of money or other annuities provided to be paid to the Indians herein named, under

any and all treaties heretofore made with them, the United States agrees to deliver at the agency house on the reservation herein provided for, on the first day of September of each year, for thirty years, the following articles, to wit:

"For each male person over fourteen years of age, a suit of good substantial woolen clothing, consisting of coat, hat, pantaloons, flannel shirt, and a pair of woolen socks; for each female over twelve years of age, a flannel skirt, or the goods necessary to make it, a pair of woolen hose, twelve yards of calico, and twelve yards of cotton domestics.

[fol. 58] "For the boys and girls under the ages named, such flannel and cotton goods as may be needed to make each a suit as aforesaid, together with a pair of woolen hose for each.

"And in order that the Commissioner of Indian Affairs may be able to estimate properly for the articles herein named, it shall be the duty of the agent each year to forward to him a full and exact census of the Indians, on which the estimate from year to year can be based; and in addition to the clothing herein named, the sum of ten dollars shall be annually appropriated for each Indian roaming and twenty dollars for each Indian engaged in agriculture, for a period of ten years, to be used by the Secretary of the Interior in the purchase of such articles as from time to time the condition and necessities of the Indians may indicate to be proper. And if at any time within the ten years it shall appear that the amount of money needed for clothing under this article can be appropriated to better uses for the tribes herein named, Congress may by law change the appropriation to other purposes; but in no event shall the amount of this appropriation be withdrawn or discontinued for the period named. And the President shall annually detail an office of the Army to be present and attest the delivery of all the goods herein named to the Indians, and he shall inspect and report on the quantity and quality of the goods and the manner of their delivery.

"Article 10. The United States hereby agrees to furnish annually to the Indians the physician, teachers, carpenter, miller, engineer, farmer, and blacksmith, as herein contemplated, and that such appropriations shall be made from time to time, on the estimates of the Secretary of the Interior, as will be sufficient to employ such persons.

"Article 11. No treaty for the cession of any portion of the reservations herein described which may be held in common shall be of any force or validity as against the said Indians, unless executed and signed by at least a majority of all the adult male Indians occupying or interested in the same; and no cession by the tribe shall be understood or construed in such manner as to deprive without his consent, any individual member of the tribe of his right to any tract of land selected by him as provided in Article 6 of this treaty."

The plaintiff tribe immediately went upon this reservation and has ever since remained thereon. Certain portions of the original reservation defined by the 1868 Treaty were ceded to the United States by agreements in 1872, 1896, and 1904, which agreements will hereinafter be referred to more particularly.

3. At the time of the making of the Treaty of 1868 the plaintiff tribe of Indians were full-blood blanket Indians, unable to read, write, speak, or understand English, with little previous contact with whites; but in all their contacts with the white people they had always been friendly. They lived mostly by hunting wild game and fishing. The affairs of the tribe were handled almost entirely by and under the advice of Chief Washakie until his death in 1900, and thereafter by the chief men and members of the tribal council.

The same condition existed in 1872 and in 1896 when agreements were made under which the tribe ceded portions of the reservation to the United States. Practically the same condition as to their education existed at the time the [fol. 59] agreement of 1904, hereinafter mentioned, was made, except, at that time, the Shoshones had considerable contact with white settlers and the Indian agents of the reservation, and a few of them could speak and understand English fairly well.

4. By reason of the loyalty of the Shoshones to the United States and Chief Washakie's outstanding friendship and respect for the military representatives and the civil officers and employees of the United States and his desire to be forever on friendly terms with the Government and its representatives, and by reason of his great influence over the members of his tribe, Washakie and the Shoshones were very tractable. Their attitude toward the Government and

its officers was always one of the fullest cooperation and they always faithfully fulfilled their agreements and promises, once they had made them. Chief Washakie, as the representative of the members of the tribe, was well informed, particularly with regard to the disposition and habits of certain other Indian tribes and with reference to the rights and privileges of the Shoshones under the Treaty of 1868; he was cautious in his dealings with other Indian tribes and with officers and representatives of the Government in matters affecting himself and members of his tribe. He always endeavored to be fair and reasonable, but at the same time he was positive in any promises or demands which he made. When he understood a matter concerning his tribe and the Government he always went as far as he felt he could in agreeing to any request made by the Government officials, but his position and statements in such matters were never indefinite, and he and the members of his tribe implicitly trusted the Government not to overreach them in any such matters. He accepted no more from others than they had promised and he trusted the Government to demand from him no more than he had promised it or its representatives. He had great faith in the representations of the officials of the Government and his attitude was that such representations were not to be disregarded, much less disobeyed or defied. By reason of the great desire of Washakie and his tribe to please the Government of the United States and do whatever they could always to remain on the best of terms with its representatives, and with the Treaty Commissions sent to negotiate with him and his tribe in matters pertaining to the reservation, he and his tribe were induced, but not without assertion of their rights, to permit the Northern Arapahoe Indians, which had been brought upon the reservation in 1878, as will hereinafter be more fully mentioned, to assemble in council with the Shoshones when called at the instance of the Government, but only upon the condition that such permission should not in any way affect the rights of the Shoshones under the treaty and agreements theretofore entered into by the Shoshone Tribe with the United States.

The plaintiff tribe has at all times borne true allegiance to the United States and in war was an ally of the Government. The Shoshone Tribe and its head, Chief Washakie in particular, have been at peace with the whites since they

first encountered Lewis and Clarke in 1805; General Ashley, Major Bridger, Sublette, Campbell, and other pioneers and traders often lived in the villages of the Shoshones in full harmony with them. Washakie took a large war party [fol. 60] of the Shoshones across Big Horn Mountain as an ally of the United States to assist General Crook in his campaign against the Sioux on the Rosebud in 1876, and at other times furnished soldiers and troops to aid the United States Army in its wars with Indians, such as the Sioux, the Arapahoes, and the Cheyennes. At no time did the Shoshone Tribe ever engage in battle, or aid or abet in battle, or war against the United States, its Army, or its white citizens. In many instances the Shoshone Indians furnished aid and comfort to the white emigrants passing through their country on the Oregon Trail and assisted in protecting the whites from hostile Indians.

5. The plaintiff's reservation, set apart by the treaty of July 3, 1868, is located in the central-western part of Wyoming. The Owl Creek range of mountains, constituting the northern boundary of the reservation, rises to an approximate elevation of 12,000 feet. The Wind River range of mountains, constituting the west and southwest boundaries, rises to a maximum elevation of approximately 14,000 feet. The reservation is protected from the elements by these two ranges of mountains; also by the Beaver Divide to the south. The ancient Indian name for the reservation is Warm Valley.

The reservation comprises the fairest and best-watered portion of the State of Wyoming. The character of the land ranges from precipitous mountains at the extreme north and west, down through heavily timbered upland, lower down through well-grassed bench land, to a series of river valleys with level, deep soil toward the eastern portion of the reservation. In the lower altitudes between these river valleys are wide areas of rolling upland covered with salt sage, black sage, and grasses. The reservation is made up in part of unsurpassed mountain scenery. These mountains are the source of some of the largest rivers on the North American continent, and contain within their recesses numerous fresh-water lakes well stocked with trout and waterfowl, and on whose banks live beaver, otter, and other fur-bearing animals. The mountains contain more than 400,000 acres of spruce, pinon, hemlock, balsam, and yellow and

white pine timber. The river valleys are level, easily irrigated, several miles in width, and contain a warm, rich, and productive soil. Stock lives the year around without other feed than being herded on the grasses growing from the mountain tops to the lowest valleys in greatest abundance, affording ample feed and range for livestock in the mountains in the summer season, and in the lower reaches of the reservation in the fall and winter seasons. The water is pure and the climate is mild and regular. The soil is rich and compares favorably in fertility to that of Illinois and Iowa. The climatic conditions are such that the grasses grown on the lower portions of the reservation cure on the ground without cutting or harvesting, and are available in that condition as feed for the livestock in the fall and winter. The average wind velocity is 4.1 miles per hour. This low-wind velocity makes for a low rate of evaporation of moisture from the soil and plants, thus facilitating the growth and preservation of plant life.

The soil and climatic conditions on the reservation are well suited for the production of alfalfa, sweet clover, hard and soft wheat, oats, barley, corn, beans, peas, tomatoes, sugar beets, garden vegetables, small fruits, and melons. The land has a high average yield of crops.

[fol. 61] The reservation contained substantial deposits of coal, oil, gas, gypsum, and minerals. On the northern and western boundaries of the reservation are numerous streams, which, generally, converge toward the east and south boundary of the reservation where they unite to form the Big Horn River. These streams traverse level valleys in the lower portions of the reservation, ranging from a half mile to five miles in width and from a few miles to 30 or 40 miles in length.

The land on the reservation best suited for agricultural purposes lies toward the eastern portion thereof where the river valleys are wider, the soil deeper and free from boulders, easy to irrigate, and nearer a railroad, and, due to elevation, the growing season is from three to four weeks longer in the eastern portion of the reservation than in the western portion. The Arapahoes were placed on the eastern portion of the reservation. The average annual precipitation on the reservation is from about ten to twenty inches in the lower portions thereof, and from twenty to twenty-five inches in the mountainous portions. Ample

water is available to irrigate all agricultural land on the reservation. The reservation is supplied with sufficient water power for the production of water, electric light and power.

At the time of the execution of the treaty of July 3, 1868, buffalo, elk, bear, antelope, deer, and other wild animals suitable for food, were in great abundance on the reservation. Such game was native and indigenous to the mountains and valleys of the reservation and was found sufficiently adequate for subsistence of the Indians for many years. The plaintiff tribe of Indians went on annual hunts into the mountains for food, and the skins of certain wild animals were used for robes and other necessary uses for members of the tribe. Prior to and after execution of the treaty of July 3, 1868, defining the original reservation for the Shoshone Indians, hunters and trappers killed many of the wild animals native to the territory covered by the treaty and many of them were frightened away—all with the result that in the years following the date of the treaty the number of buffalo and other wild animals roaming the reservation and within the mountainous regions thereof was greatly reduced.

6. Promptly following the execution of the treaty of 1868, the United States constructed on the reservation the agency house and other buildings mentioned therein and furnished an agent, together with other employees provided for in the treaty. Thereupon the Shoshone Tribe occupied the reservation and ever since that date it has made the same its permanent home, making no settlement elsewhere, and that tribe has claimed the reservation as its own exclusive property continually and uninterruptedly since that date and during such period it has held possession of and occupied the same. Ever since entering into the treaty the Shoshones have fulfilled all the obligations, terms, and conditions therein required of them.

7. May 10, 1868, a treaty was entered into between the Northern Arapahoe Indians and the United States (15 Stat. 655), by the terms of which, among other things, said Northern Arapahoes agreed to accept "for their permanent home some portion of the tract of country set apart and designated as a permanent reservation for the Southern [fol. 62] Cheyenne and Arapahoe Indians by a treaty entered into * * * at Medicine Lodge Creek [seventy

miles south of Larned, Kansas, October 28, 1867, ratified July 25, 1868], or some portion of the country and reservation set apart and designated as a permanent home for the Brule and other bands of Sioux Indians, by a treaty * * * of April 29, 1868" (15 Stat. 635).

By this treaty of May 10, 1868, the Northern Arapahoe Indians relinquished, released, and surrendered to the United States all right, claim, and interest in and to all territory outside the two reservations mentioned; and in this treaty the United States agreed to assist the Arapahoes in farming on said reservations, to provide for the selection of certain tracts of land in severalty thereon for the Arapahoes, to provide schools thereon for the education of Arapahoe children, and to provide clothing and rations, also a physician, teachers, carpenters, and other employees, all for their sole benefit.

8. A tract of country was assigned under the Ft. Laramie Treaty of 1851 to the Arapahoe and Cheyenne Indians on the south and north of So. Platte River. The Arapahoes occupying that portion of the country north of the South Platte River were known and called the "Northern Arapahoes and Cheyennes", and those occupying that portion south of the river as the "Southern Arapahoes and Cheyennes." The division in the Arapahoé Tribe became permanent because of the feud arising between them in 1854, one part thereafter, the Southern Arapahoes, living on the Arkansas River, and the other, the Northern Arapahoes, living on the North Platte River. By the treaty of May 10, 1868, the Northern Arapahoes agreed to attach themselves permanently either to the agency provided near the mouth of Medicine Lodge Creek or to the agency to be established on the Missouri River near Ft. Randall, or to the Crow Agency near Otter Creek on the Yellowstone River. One hundred and nineteen lodges of Arapahoes, constituting the greater portion of the Northern Band of that tribe, arrived in June 1868 at Ft. Laramie from the Powder River country en route to the Southern Band of Arapahoes. There were still a number of Northern Arapahoes, consisting of about twenty-five lodges under Chief Medicine Man, encamped on the Crazy Woman's Fork of the Powder River.

Efforts were made in the summer of 1868 to remove Chief Friday and his band of Northern Arapahoes from a point about seventy-five miles north of Denver to the main body

of the nation but they were adverse to removal to a new home, preferring to remain on the Great Platte where they had so long resided. However, in 1869 this band of Northern Arapahoes, with that of Chief Medicine Man (about one hundred lodges) expressed a desire to join Washakie and his tribe of Shoshone Indians on the Wind River Reservation set apart for the Shoshones by the treaty of July 3, 1868, "and for such other friendly tribes or individual Indians as from time to time the Shoshones might be willing, with the consent of the United States, to admit amongst them." When Washakie was told of the matter mentioned by the Arapahoes he expressed surprise that the Arapahoes, who for years had been allied with the Sioux and Cheyennes against him, should now so suddenly wish to join him; but, as he remembered Chief Friday as a friend of his youth, and being impressed with the fact that Friday was asso- [fol. 63] ciated with the band of Northern Arapahoes, he agreed to meet the band that he might more fully understand their purpose. In October 1869 Friday and other chiefs of the Northern Arapahoes went with Major General Augur to the Shoshone Reservation to treat with Washakie for a home, but Washakie had gone on a hunt when they arrived and nothing was done. In February 1870 they again visited Washakie and the Shoshones and made peace with them, but Washakie and the Shoshones refused to agree to permit the Arapahoes to live on part of their reservation; however, Washakie agreed to permit the Arapahoes to come upon the reservation for a short time in order that he might thereby assist the Government in making permanent disposition of them. The band, under Friday, comprised many decrepit men and women, and young children. Under this arrangement with Washakie the Northern Arapahoes came to and remained on the Shoshone Reservation until March 31, 1870, when a massacre of settlers and miners occurred on the Sweetwater River, near the reservation on the east, which was believed to have been perpetrated by these Arapahoe Indians although they denied knowledge of the matter.

April 8, 1870, a company of settlers, meeting thirteen Northern Arapahoes under Chief Black Bear, in retaliation killed him and ten of his party. Thereupon it was suggested by the officials of the Indian Department that the Northern Arapahoe Indians occupy the country about old Ft. Casper, as they had expressly declared they would not

go to either of the reservations provided for them under the treaty of May 10, 1868. It was also suggested that they be sent to the Gros Ventres Agency on Milk River. They decided to go to old Ft. Casper, about one hundred and seventy-five miles from the Red Cloud Agency, and, accordingly, they were removed from the Shoshone Reservation. The Northern Arapahoes did not remain upon the reservation provided for them and repeated efforts, during the period 1851 to 1878, to place them in settled homes were without success. They were known to be traditional enemies of the Shoshones.

In 1873 there were about 2,757 Northern Arapahoe and Cheyenne Indians under the Red Cloud Agency. A number of Arapahoes who left the Red Cloud Agency, going east early in 1873, were charged with the Rawlings Spring massacre. The Indian Department of the Government insisted upon the removal of the Arapahoes and Cheyennes from the Red Cloud Agency to the Indian Territory. About that time the Sioux War broke out—many of the Northern Arapahoes being affiliated with the Sioux. After the surrender of the main portion of the hostile Sioux and other tribes, the Cheyennes at the Red Cloud Agency were removed to Indian Territory in May 1877.

9. The record does not disclose exactly what happened to the Northern Arapahoe Indians between the time they removed from the Shoshone Reservation early in 1870 until late in 1877, except that they were not located upon any defined reservation. It appears that in 1877 these Indians were in the vicinity of old Ft. Casper, but they apparently were not being furnished food, clothing, or supplies by any Indian agency.

December 4, 1877, the Commissioner of Indian Affairs instructed Patten, agent of the plaintiff tribe of Indians on the [fol. 64] Shosho.. Reservation in Wyoming, to go to Ft. Fetterman, Wyoming, fifty miles east of old Ft. Casper, to distribute food and clothing to the Northern Band of Arapahoe Indians, who would be at Ft. Fetterman by the time he arrived there. This matter and the subsequent movement of the Northern Arapahoe Indians will hereinafter be referred to more fully.

10. About October 1, 1877, a delegation of the Sioux and Arapahoe Indians visited Washington and called upon the Commissioner of Indian Affairs and the President, and the

matter of their location upon some reservation was discussed. James Irwin, who had previously been agent for the Shoshones, but who was then the Indian agent at the Red Cloud Agency, which then had supervision over the Northern Arapahoe Band of Indians, was present. He had been instructed on September 12, 1877, to come to Washington with this delegation and to bring his interpreter. October 4, 1877, the Commissioner of Indian Affairs requested the Secretary of the Interior that "Dr. James Irwin, Indian agent at Red Cloud Agency, be authorized to proceed to the Shoshone Reservation in Wyoming and consult with the Indians there, with the intent to gain their consent to permit the Arapahoes (now at Red Cloud Agency) to remove to their (the Shoshone) reservation, both tribes to be under the control of one agent." The requested authority was given, and on the same day the Commissioner of Indian Affairs wrote Irwin at the Grand Central Hotel, New York, to "proceed at once to the Shoshone Reservation to consult with the Indians there, with the intent to gain their consent to the removal of the Arapahoes thither, both tribes to be under the care of one agent. You will represent to them the advantage of having a neighboring friendly tribe associated with them, and from your large experience with the Shoshones will be able to present such arguments as will obtain their ready consent to the proposed arrangement." James Irwin had been an Indian agent for a considerable time prior to this date and was well acquainted with and highly respected by many Indian tribes, including the Shoshones. He had previously been agent for several years for the Shoshones on the Wind River Reservation.

Irwin proceeded to the Shoshone Reservation, of which James I. Patten was then in charge as Indian agent. Agent Irwin held a council with Chief Washakie and the Shoshone Indians, at which council were present James I. Patten, agent; Capt. E. M. Hayes, U. S. A., commander of Camp Brown, located on the Shoshone Reservation; Capt. Woodson; Lieutenants S. A. Cherry and H. S. Bishop, U. S. A.; James K. Moore, post trader, Camp Brown; R. B. Frimes, post surgeon, Camp Brown; the agency physician and other citizens and employees on the reservation. Agent Irwin discussed with Chief Washakie and the Shoshones the matter of the contemplated removal of the Northern Arapahoe Band of Indians from their then location, but distinctly told Chief Washakie and the Shoshones that the President

had no intention of placing the Arapahoes on the reservation of the Shoshones, and that this was not the design of the Government; that all that was desired was that the Shoshones make peace with the Northern Arapahoe Tribe of Indians and that the Department would have a piece of land near the mouth of the Sweetwater, near the eastern [fol. 65] boundary line of the Shoshone Reservation, set apart for the Arapahoes; that although the agent of the Shoshones would be agent of the Arapahoes also, yet the Government did not intend to place the Arapahoes directly on the Shoshone Reservation. This, as stated by Irwin at the time, was in accordance with the promise of the President to the delegation of Northern Arapahoe Indians on their visit to Washington in October 1877. In these circumstances Chief Washakie and the Shoshones agreed to make peace with the Arapahoes and informed Agent Irwin that they had nothing to say against their agent being over the Arapahoe Tribe also, but that they wanted the Arapahoes placed on a reservation apart from the Shoshones, giving as their reason therefor that the reservation, as at that time, was none too large for the use of the Shoshones, and, furthermore, that the Shoshones were afraid that the two tribes would not agree well together—that the Arapahoes would probably ill-behave themselves and bring trouble upon the Shoshones. At the same time, Irwin informed Agent Patten, of the Shoshone Reservation, that "the President promised the Arapahoes a reservation at the Red Buttes, including the mouth of the Sweetwater, and that is what the Arapahoes wanted, and that the agent of the Shoshones should be their agent, and that is * * * all the President will ask to have done." Agent Irwin did not ask the Shoshones to express their willingness to admit the Band of Northern Arapahoe and Cheyenne Indians amongst them upon their reservation or to consent to the placing of the Indians upon the Shoshone Reservation, either temporarily or permanently, and the Shoshone Tribe of Indians did not at that time, or at any time thereafter, express their willingness or give their consent to admit the Arapahoe Indians amongst them as permanent occupants. Agent Irwin, after his council with Chief Washakie and the Shoshone Indians, as above set out, sent a telegram to the Commissioner of Indian Affairs at Washington, dated Cheyenne, Wyoming, October 17, 1877, in which he stated, "I returned from Shoshone Agency today. Held

council and made peace between Shoshones and Arapahoes." The details of the council between the Shoshones, Irwin, and Patten, as above set forth, were reported to the Commissioner of Indian Affairs by Patten in a written report dated February 21, 1878. None of the Northern Band of Arapahoes arrived at the Shoshone Reservation until March 18, 1878, as hereinafter mentioned. After the conference of Irwin and Patten with the Shoshones about the Arapahoe Indians, nothing further occurred until December 4, 1877, when the Acting Commissioner of Indian Affairs wired Agent Patten of the Shoshone Reservation to proceed to Ft. Fetterman to receive and distribute certain supplies to the Northern Arapahoe Indians who were then, or would be, at Ft. Fetterman. Patten proceeded to Ft. Fetterman and inasmuch as neither the supplies nor the Indians had arrived at that point he secured means of transportation and proceeded to the camp where the Northern Band of Arapahoes was then located on their way to Ft. Fetterman and conferred with the Indians and Chiefs Black Coal, Friday, and Plenty Bear. Patten informed these Indians that he had come to distribute supplies to them and alluded to their being located upon a reservation where they could be better looked after by the Government. Chief [fol. 66] Black Coal referred to the visit of a delegation to Washington the preceding fall and to the fact that the President had promised to give them an agent; that for four years his tribe had wished to have an agent and a reservation of their own, and that they were now willing to go upon a reservation. Patten found this band of Indians very poorly equipped, destitute, and hungry, and before leaving Ft. Fetterman he arranged for distribution to them of 2,600 rations from military supplies; thereupon he was instructed to return to the Shoshone Reservation. He arrived there January 13, 1878.

Patten, in his report of January 17, 1878, to the Commissioner of Indian Affairs of his trip to Ft. Fetterman, stated that the telegram of December 4, 1877, instructing him to proceed to Ft. Fetterman to distribute supplies to the Arapahoes was "the first intimation received that these Indians were to be placed under my charge", and concluded with the statement that "I most respectfully request that full instructions be given me in relation to Arapahoe Indians, whether they are to be placed on the Shoshone Reservation, either temporarily or

permanently, and that in either case a permanent peace be made between the Arapahoe and all other tribes with whom they are not now on such terms before they come in." No reply was made to this request.

On February 21, 1878, Agent Patten again wrote the Commissioner of Indian Affairs, referring specifically to the council with the Shoshones held by James Irwin the preceding October, calling attention to the fact that at that council the Shoshones had not expressed their willingness to admit the Arapahoes amongst them nor consented thereto, and again asked for instructions concerning the matter, to which no reply was made. The Northern Band of Arapahoe Indians was then being brought from Ft. Fetterman to the Shoshone Reservation under military escort. Some of them arrived there March 18, 1878, without any previous knowledge to the Shoshones of their coming. Their arrival caused considerable excitement amongst the Shoshones, resulting in demonstrations in the Shoshone village, at which the Arapahoes, believing there would be trouble, became frightened. A delegation of Arapahoes, consisting of Black Coal and ten of his young men, came to the Shoshone Agency, the remainder of the Northern Band of Arapahoes being then camped some distance from the reservation. The principal military officers in charge of the military forces stationed in the Indian country protested to the Commissioner of Indian Affairs with reference to the removal of the Arapahoe Indians to the Shoshone Reservation and insisted that the Arapahoes should be removed to the Indian Territory. Patten suggested to the Department at Washington that action be speedily taken to place the Arapahoes on land of their own. In his telegram to the Commissioner of Indian Affairs March 18, 1878, Patten advised that the Arapahoes were "anxious to get located upon their reservation, wherever it is to be", and stated that they were greatly in need of food and supplies. He asked for immediate instructions. On April 2 the Commissioner of Indian Affairs wired Patten with reference to furnishing food and supplies to the Arapahoes, and instructed him to "report fully by mail what other measures are necessary to locate the Band of Northern Arapahoe Indians under Black Coal." On March 19, 1878, Chief Washakie and a number of Shoshones met the

[fol. 67] Arapahoe delegation at the agency with Black Coal, the main chief, and Sharp Nose, White Horse, Six Feathers, and Friday, the latter being able to speak English. After some discussion between the Shoshones and Arapahoes the latter explained to Chief Washakie that their horses and their traveling equipment were in very bad condition; that their horses needed food and rest; that the Arapahoes were without food, and that many of their number were sick; whereupon the Shoshones, through Chief Washakie, remembering their council with Irwin and Patten the preceding October, informed the Arapahoe chiefs that they might remain there for only a brief visit, but that they would have to leave as soon as they had rested and fed their horses. The Arapahoes stated that they could not possibly return to the place they had come from and asked Washakie to grant them permission to remain there for a little longer period than for a brief visit, so that their horses could be fed and rested, and that they would then remove from the reservation. They explained to Washakie that many of the Arapahoes had no horses at all; that they understood that the Government was preparing a reservation for them near the mouth of the Sweetwater River, and that they would go to this place as soon as possible. Thereupon, Chief Washakie stated to the Arapahoe delegation that he would permit them to come upon the Shoshone Reservation and remain there for a short time to rest for awhile and feed their horses. At this meeting the matter of the settlement of the Arapahoes upon the Shoshone Reservation was not mentioned and Washakie and the Shoshones were not then, or thereafter, requested to admit the Arapahoes amongst them upon the Shoshone Reservation. April 8, 1878, Agent Patten reported to the Commissioner of Indian Affairs that most of the Northern Arapahoe Tribe were then on the Shoshone Reservation and in reply to the Commissioner's telegram of the 2d, asking him to report fully by mail what other measures were necessary to locate the band of Northern Arapahoe Indians on the Shoshone Reservation, stated that he did not believe that much difficulty would be experienced in settling that tribe upon the Shoshone Reservation—that "the Shoshones, although they are opposed to it and look upon it as an encroachment on their rights, yet will make no great objections to the settle-

ment of the former tribe upon their land, knowing that it is the wish of the Great Father to bring several small bands of Indians together on the same reservation. Washakie and the head men, though they dislike bitterly to divide their property with other bands, have too great hearts to say No. But my sense of right and justice is that, if other tribes are brought upon the Shoshone land, it should be with the full consent of the tribe owning the land by rights of their treaty, and that such Indians should receive reasonable compensation for relinquishment of their reservation. I would therefore earnestly recommend that the Shoshones be allowed a just sum for the relinquishment of a certain tract of land, within the limits of their reservation, to the Northern Arapahoes." After stating that the Arapahoes were in a famished condition and that he had purchased additional food and supplies for them, he informed the Commissioner of Indian Affairs that "the Shoshones are not all in favor of allowing the Arapahoes a portion of this reservation. They claim that they hold [fol. 68] this land by right of their treaty made with the Government at Ft. Bridger in 1868, that the Government has no right to abrogate the same without the consent of the Shoshones"; that the Shoshones, however, had agreed to allow the Arapahoes to remain there for a short time and that both tribes wished the Department Commander, General Crook, to be present at a council to be held between the tribes at the agency on some convenient date in that month to have the matter of the location of the Arapahoes permanently settled. No reply was made by the Interior Department to this and many other reports of the agent calling attention to the persistent claims of the Shoshones that the Arapahoes were wrongfully upon that reservation and no steps were taken by the Department towards obtaining the consent of the Shoshones to admit the Arapahoes amongst them or to place the Arapahoes elsewhere. No action was taken by any official of the United States or the Interior Department concerning the location of the Arapahoes until August 1891, when the Commissioner of Indian Affairs definitely held that the Arapahoes had equal rights with the Shoshones on the Shoshone Reservation, as hereinafter mentioned.

After the Arapahoes had camped upon the reservation, fed their horses, and had been furnished food and supplies

by the agency for several months, the Shosnone Tribe, through Chief Washakie, began to protest to the agent against their continued presence upon the Shoshone Reservation. Such protests were thereafter continued and were mentioned from time to time in the reports of the Indian agent to the Commissioner of Indian Affairs, but no action was taken thereon. The Arapahoes remained on the Shoshone Reservation, used and occupied the same equally with the Shoshones, pastured their stock and engaged in farming thereon, and received the benefits of all facilities and services equally with the Shoshones.

11. No definite action was ever taken by the officials of the Government with reference to the permanent settlement of the Arapahoes until August 13, 1891. Shortly prior to that date a commission, known as the "Woodruff Commission", had been sent to the Shoshone Reservation to negotiate for a cession of such portion of the reservation as the Indians chose to dispose of. On August 5, 1891, the chairman of the Commission wrote the Commissioner of Indian Affairs asking for instructions as to how the Commission should treat with the Indians, inasmuch as Chief Washakie and the Shoshones denied that the Arapahoes had any rights to or upon the reservation. He stated that the Shoshones insisted that the Arapahoes came there merely as temporary visitors; that the claim of the Shoshones to the whole of the reservation was backed by Dr. James Irwin, who was present and discussed the matter of the presence of the Arapahoes with Chief Washakie and the Shoshones shortly before their arrival at the Shoshone Reservation in March 1878. In reply the Commissioner of Indian Affairs, on August 13, advised the Commission that "this office holds * * * that the Arapahoes have equal rights to the land on the said reservation which does not depend upon the further consent of the Shoshones, and you should conduct your negotiations with them upon that basis and with that understanding." This is the only action ever taken by anyone representing the [fol. 69] United States with reference to the permanent settlement and location of the Northern Arapahoe Band of Indians upon the Shoshone Reservation. Notwithstanding the continued protests of the Shoshones, the Woodruff Commission proceeded to counsel alike with the Shoshone and the Arapahoe Indians. The result of these negotiations

will be further referred to hereinafter. The ruling made by the Commissioner of Indian Affairs on August 13, 1891, has ever since been enforced by the Interior Department. No action, except the enactment of the Jurisdictional Act in this case, was ever taken by Congress with reference to the presence of the Arapahoe Indians upon the Shoshone Reservation.

12. Prior to the execution of the Shoshone Treaty, July 3, 1868, gold had been discovered at a point near the boundary line of the Shoshone Reservation on the south end of the Wind River Mountains and the gold-mining district extended within the boundary line of the reservation as fixed in the treaty and a large quantity of gold was removed from the mines on the reservation by persons engaged in that enterprise. As a result of this intrusion, Felix R. Brunot was appointed a commissioner to negotiate with the Shoshone Indians for the cession of a portion of the reservation located in the gold-mining district. The best gold mines in the district had been found to be located within the reservation. As a result, Brunot obtained an agreement from the Shoshones ceding 700,642 acres of the reservation for a total consideration of $27,500. At that time the Indians had no conception of the value of money or the value of the property they were surrendering to the Government and they accepted, without question, Brunot's first offer of the amount stated. With reference to the consideration to be paid for this cession, Brunot reported to the Commissioner of Indian Affairs that "Acting upon my experience of the general habit of Indians, the Shoshones were offered a sum as the basis of further negotiation, and which I supposed would have to be increased to meet the demand of the Indians. When the terms first offered were promptly accepted, I did not feel at liberty to make an addition it seems eminently proper to solicit from Congress." No further amount was ever paid for this cession.

Between July 3, 1868, the date of the treaty, and 1874, when the cession agreement above mentioned was ratified, gold of the value of $500,000 was mined and removed from land within the boundary of the undiminished reservation. After this cession the diminished reservation contained 2,343,540 acres.

13. The Woodruff Commission, hereinbefore referred to, sent to negotiate with the Indians for a cession of a portion of their reservation in 1891, finally obtained an agreement signed by certain of the Indians agreeing to sell approximately 1,100,000 acres of land for a consideration of $600,000, with interest at 5 percent per annum offered by the commission. The land specified in that agreement was north of the Wind River. This land was not as fertile or as valuable as that on the southern and eastern portions of the reservation. The commissioners representing the United States in the negotiation of this agreement were in disagreement with respect thereto, and the same was never ratified by Congress. Efforts were made by this commission to obtain from the Indians a cession of substantially the same area of land south of the Wind River, for which an offer of $775,000 was made, [fol. 70] but the Indians refused on the ground that the land south of Wind River was much more valuable.

14. The next agreement ceding 55,040 acres of land embracing the Big Horn Hot Springs was on April 21, 1896, approved June 7, 1897, 30 Stat. 62. This land was located in the northeast corner of the reservation. This agreement was negotiated and made on behalf of the United States by James McLaughlin, U. S. Indian inspector, who was well known to the Shoshone Indians. He had considerable difficulty in carrying on negotiations with the Shoshone and the Arapahoe Indians by reason of the protests and objections of the Shoshone Indians to the presence of the Arapahoe Indians in council with them and to their presence upon the reservation—the Shoshones insisting that the Arapahoes were not rightly on that reservation and that they had no rights in the reservation lands. It was only after McLaughlin agreed to insert a provision in the agreement protecting the rights of the Shoshones under the existing agreements and treaty stipulations that he was able satisfactorily to carry on his negotiations. Accordingly, he inserted in the agreement, which was signed and ratified, art. 4, which provided that "Nothing in this agreement shall be construed to deprive the Indians of any annunities or benefits to which they are entitled under existing agreements or treaty stipulations." The consideration agreed to be paid, and which was paid, for this cession of 55,040 acres of land was $60,000. After this

cession the diminished reservation consisted of 2,288,500 acres of land.

15. In April 1904 Inspector James McLaughlin was again sent to negotiate with the Indians of the Shoshone Reservation for the purpose of securing an agreement ceding a portion of the Wind River Reservation to the Government for the purpose of sale of such lands, the timber thereon, and other products of the reservation, and for the making of leases in respect thereof for various purposes. The proceeds derived from such ceded lands were to be credited to the Indians entitled thereto. In his negotions Inspector McLaughlin met with the same situation respecting the objections of the Shoshones to the presence of the Arapahoes upon the reservation and in the councils that he had encountered in 1896, and this was overcome by promising the Shoshones that he would insert in whatever agreement was reached a provision protecting their rights under their treaty and prior agreements. This was done. As a result of the negotiations an agreement was concluded April 21, 1904, approved March 3, 1905, 33 Stat. 1016, between McLaughlin, representing the United States, and the Shoshone and the Arapahoe Tribes of Indians ceding to the United States, for the purposes mentioned, 1,480,000 acres of land on the east of the diminished reservation, leaving 808,500 acres. No further cessions have been made.

16. It was known in 1891 that the Shoshone Reservation contained a large, but undetermined, quantity of coal, oil, and gas, phosphate and gypsum. The fair and reasonable value of a one-half undivided interest of the Shoshone or Wind River Reservation on August 13, 1891, was $2,050,597.50. The fair and reasonable value of use and occupancy of an undivided one-half of the Shoshone Reservation by the Northern Arapahoe Indians was $332,475. The population of this tribe averaged 1,023 a year from March 18, 1878, to August 13, 1891. [fol. 71] The respective population of the Shoshone and the Northern Arapahoe Tribes of Indians from 1878 to date has been approximately equal.

17. During the period from 1873 to 1894 several thousand cattle and horses belonging to persons other than the Shoshone and the Arapahoe Indians annually came upon,

grazed, and ranged on or over the reservation, and, in some instances, damaged the crops and foodstuffs belonging to plaintiff tribe of Indians. The evidence does not establish that the Government did not use its best efforts to keep this stock off the reservation.

18. During the period 1869 to 1909, inclusive, the Government maintained a military post of soldiers and cavalry on the Shoshone Reservation, which post embraced an area of about 1,400 acres. This was one of the several military posts stationed at that time in the western country to maintain peace among the Indian tribes and to protect the white people from hostile tribes of Indians. During this period the officers of the military post used large quantities of wood and hay from the Shoshone Reservation. The Indians on the reservation were authorized to furnish the wood needed by the military post and were paid for the same. In addition, the Shoshone Indians, a few years after they were located on the reservation, were given contracts for transportation of wood to the military post and were, accordingly, paid for such services. Payments were likewise made for hay.

19. Shoshone Treaty appropriations and disbursements. —During the period July 1, 1867, to June 30, 1927, Congress appropriated a total of $1,375,665.34 for the purpose of carrying out the stipulations of the treaty of July 3, 1868, with plaintiff tribe. A total of $806,622.26 was disbursed for the purposes specified in the treaty and charged to the Shoshones and $33,806.24 was disbursed in payment for transportation of goods and supplies which under art. 2 the United States agreed to furnish and deliver on the reservation. The latter amount was charged to the Shoshones jointly with the Bannock Tribe of Indians as an expenditure under art. 9 of the treaty. The total disbursements pursuant to the treaty were, therefore, $840,428.50. The amount of $245,980.98 of the unexpended balance of the total appropriations was returned to the Treasury by surplus warrants and $288,053.84 was accounted for through certain transfers and expenditures for the Bannocks, leaving a balance of $1,202.02 on hand.

The total treaty disbursements up to and including the fiscal year ended June 30, 1877, were $278,993.42. The total treaty disbursements from 1878, when the Arapahoes moved

to the reservation, to June 30, 1927, amounted to $561,435.08. [fol. 72] The amounts expended by the United States under the various articles of the treaty of 1868 and charged to the account "Fulfilling treaty with the Shoshones", were as follows:

Article	Purpose	Amount
3	Agency buildings	$ 18,635.42
7	Education	6,270.97
9	Education	4,188.34
10	Education	21,164.47
8	Seeds and implements	1,000.00
9	Clothing, supplies, provisions, etc., and annuities	487,719.56
10	Skilled employees	267,593.50
9	Transportation of treaty supplies	33,806.24
11	Prizes	50.00
	Total	840,428.50

No annuity goods or provisions which the United States agreed to furnish plaintiff tribe under the treaty of July 3, 1868, were diverted to or disbursed to the Northern Arapahoe Indians. Separate appropriations for annuity goods and provisions for the Northern Arapahoes were made by Congress from year to year under their treaty of May 10, 1868, and the Black Hills Agreement of 1877 with the Sioux in the benefits of which the Northern Cheyenne and Northern Arapahoes shared.

20. After the Arapahoes arrived on the reservation in March 1878, they shared in the educational expenses provided for and disbursed under the Shoshone Treaty to the extent of $2,645.73. The Arapahoes also shared equally with the Shoshones the services of skilled employees furnished and paid for under art. 10 of the Shoshone Treaty of July 3, 1868, to the extent of $128,801.55, being one-half of the treaty disbursements for skilled employees and certain other agency expense under the same article from 1878 to 1927, inclusive. The Arapahoes also shared equally with the Shoshones in treaty disbursements totaling $3,962.30 for miscellaneous agency buildings, repairs, expenses, fuel and light, and for Indian police disbursed under art. 9. The evidence does not show that the employees and facilities furnished plaintiff tribe by the United

States under the treaty of July 3, 1868, were not adequate for such tribe.

21. Under the agreement of September 26, 1872, 18 Stat. 291, hereinbefore mentioned, in which plaintiff tribe ceded a portion of its reservation in the gold-mining district to the United States for a consideration of $27,500, the record discloses that $27,485.50 was paid to or expended for the benefit of the plaintiff tribe in accordance with the provisions of the agreement, leaving a balance of $14.50 which was covered into the Treasury by a surplus warrant of June 30, 1879.

22. Under the agreement of April 21, 1896, 30 Stat. 93, covering the Big Horn Hot Springs cession of 55,040 acres, in which agreement the Arapahoe Indians were permitted to participate, over the protest of the plaintiff tribes, Congress appropriated the consideration of $60,000 therein mentioned. Arts. 2 and 3 of this agreement follow:

"Article II

"In consideration for the lands ceded, sold, relinquished, and conveyed as aforesaid, the United States stipulates and agrees to pay to the said Shoshone and Arapahoe tribes of Indians the sum of sixty thousand dollars, to be expended for the benefit of the said Indians in the manner hereinafter described.

"Article III

"Of the said sixty thousand dollars provided for in article II of this agreement it is hereby agreed that ten thousand dollars shall be available within ninety days after the ratification of this agreement, the same to be distributed per capita, in cash, among the Indians belonging on the reservation. That portion of the aforesaid ten thousand [fol. 73] dollars to which the Arapahoes are entitled is, by their unanimous and expressed desire, to be expended, by their agent, in the purchase of stock cattle for distribution among the tribe, and that portion of the before-mentioned ten thousand dollars to which the Shoshones are entitled shall be distributed per capita, in cash, among them: Provided, That in cases where heads of families may so elect, stock cattle to the amount to which they may be entitled may be purchased for them by their agent.

"The remaining fifty thousand dollars of the aforesaid sixty thousand dollars is to be paid in five annual installments of ten thousand dollars each, the money to be expended, in the discretion of the Secretary of the Interior, for the civilization, industrial education, and subsistence of the Indians; said subsistence to be of bacon, coffee, and sugar, and not to exceed at any time five pounds of bacon, four pounds of coffee, and eight pounds of sugar for each one hundred rations."

Of the total consideration the sum of $20,553.22 was expended under art. 2 for the following purposes and charged directly to the plaintiff tribe:

1. Per capita payments	$4,966.88
2. Provisions and other rations	14,056.35
3. Agricultural implements and equipment	1,139.80
4. Fuel and light	363.33
5. Hardware, glass, oil and paints	26.86

The amount of $3,960.97 was expended under art. 3 for the following purposes and charged to the plaintiff and the Arapahoe Tribe jointly:

1. Agricultural implements	$1,822.61
2. Grist mill	976.70
3. Miscellaneous employees	215.00
4. Expenses of delegation	889.38
5. Education: Provisions	57.28

The amount of $34,948.58 of the total consideration of $60,000 was disbursed by the Government and charged directly against the Arapahoe Tribe of Indians. The accounting submitted by the defendant does not show the nature and purposes making up this expenditure for the Arapahoe Tribe. It appears, however, that a portion of the amount charged to the Arapahoes was used to purchase cattle for them. The amount of $16.86 of the remainder of the $60,000 was disbursed for the Jamez Day School, Pueblo Agency, leaving an unexpended balance of $520.37 on hand as of June 30, 1927. The Arapahoes were entitled to only one-half of the total consideration paid under this agreement. Plaintiff tribe was therefore entitled to an additional credit of $7,661.84.

23. The agreement of April 21, 1904, 33 Stat. 1016, hereinbefore mentioned, ceded 1,480,000 acres of land which the United States under art. 2 agreed to sell and lease for the benefit of the Indians belonging to the Shoshone or Wind River Reservation. By subsequent articles, as amended by the act of March 3, 1905, ratifying the agreement, the United States agreed to expend certain of the proceeds derived from the ceded portion for the benefit of the Indians and to hold the balance in trust at four-percent interest, the interest to be expended annually for the benefit of the Indians.

The representative of the Government permitted the Arapahoe Indians to take part in the negotiation and signing of this agreement under the definite ruling of the Com- [fol. 74] missioner of Indian Affairs in August 1891 that they had that right. The plaintiff tribe proceeded with the negotiations leading to the execution of this agreement, and, upon the demand of the Government representative, permitted the Arapahoes to participate in the councils with reference thereto and in the execution of the agreement, but only upon condition that the agreement contain the provision which had been inserted in the agreement of April 21, 1896, to the effect that nothing in the agreement should be construed to deprive the Indians of any annuities or benefits to which they were entitled under existing agreements or treaty stipulations. A total of $314,746.34 was received by the Government under this agreement to June 30, 1927, and carried in the account "Proceeds of Wind River Reservation, Wyoming." In addition to the amount of $85,000 for per capita payments, appropriated in sec. 3 of the act ratifying the agreement, to be reimbursed from the first proceeds of sale of ceded lands, Congress appropriated the amount of $200 for this purpose, which was also to be reimbursed. Additional reimbursable appropriations were also made for (1) surveying the reservation; (2) irrigation system; and (3) roads and bridges. All of the reimbursable disbursements made from the proceeds received under this agreement to June 30, 1927, have been repaid except $100 of the item of $82,200 for annuities. The amount of $311,516.37 of the total of $314,846.34 received from the sources mentioned in this agreement was disposed of as follows, leaving a balance of $3,329.97 on hand:

Surveying	$34,659.19	
Opening reservation	8,325.64	
Commissions on land sales	1,465.57	
Repayments of purchase money	935.91	
		$45,386.31
Irrigation	73,471.05	
Roads and bridges	50,293.68	
		123,764.73
Shoshone annuities		41,900.00
Arrapahoe annuities		43,300.00

24. By the act of March 3, 1883, 22 Stat. 582, 590, it was provided that "The proceeds of all pasturage and sales of timber, coal, or other product of any Indian reservation, except those of the Five Civilized Tribes, and not the result of the labor of any member of such tribe, shall be covered into the Treasury for the benefit of such tribe under such regulations as the Secretary of the Interior shall prescribe; and the Secretary shall report his action in detail to Congress at its next session."

By the act of March 2, 1887, 24 Stat. 449, the Secretary of the Interior was given authority to use such monies "for the benefit of the several tribes on whose account said monies were covered in", and the act of May 18, 1916, 39 Stat. 123, provided how these funds should be handled in the future. From 1884 to 1913 the monies collected from sources originating in the land, including pasturage, sales of cattle, hides, timber, coal, and from oil and gas royalties under the act of March 3, 1883, were credited to the Shoshone and Arapahoe Indians in separate accounts under the title "Indian monies—Proceeds of labor." From 1913 to 1927, inclusive, monies received from these sources were [fol. 75] deposited in the fund to the joint credit of the Shoshone and the Arapahoe Tribes. From July 1, 1884, to June 30, 1927, there has been collected and deposited in the fund a total of $1,628,744.56 and credited to the Shoshone and Northern Arapahoe Tribes as follows:

Shoshone Tribe	$97,985.20
Northern Arapahoe Tribe	100,686.62
Shoshone and Northern Arapahoe Tribes jointly	1,430,072.74
	1,628,744.56

During the period above mentioned disbursements were made out of this fund in the amounts of $260,235.27 charged to plaintiff tribe; $293,938.57 charged to the Northern Ara-

pahoe Tribe; $962,568.98 charged to the two tribes jointly; and $64.12 for the Western Shoshones at Ft. Hall, Idaho, leaving a balance of $111,937.62 on hand. Among the items making up the total disbursements, as above mentioned, there were the following:

Purpose of disbursement	Charged to Shoshones	Charged to Arapahoes	Charged jointly
Agency buildings and repairs, jointly	.....	.....	$13,668.54
Expenses of delegations	$1,870.60	$2,916.17	.20
Fuel and light	515.40	361.40	50,817.64
Indian police:			
Arms and ammunition	.....	.....	14.75
Clothing	.....	.....	16.00
Irrigation	.....	.....	1,183.03
Miscellaneous agency employees	4,470.41	2,799.51	97,845.45
Miscellaneous agency expense	896.42	366.09	37,987.69
Pay of special officer	.....	.....	5,683.25
Presents	75.00	73.00	190.65
For Western Shoshone Tribe at Fort Hall, Idaho	.....	.....	64.12

25. Offsets under gratuity appropriations and disbursements.—Section 3 of the Jurisdictional Act provided that "In said suit the court shall also hear, examine, and adjudicate any claims which the United States may have against said tribe, but any payment, including gratuities which the United States may have made to said tribe, shall not operate as an estoppel, but may be pleaded as an offset in such suit." During the period July 1, 1867, to June 30, 1927, the Congress appropriated and the Indian Department made gratuity disbursements totaling $1,223,266.26, of which $166,189.28 was charged against the plaintiff tribe directly and $1,057,076.98 against the Shoshone, Bannock, and Arapahoe Tribes jointly for the purposes and in the amounts following:

[fol. 76]

Schedule no.	Name of appropriation fund	Direct	Jointly with other Indians
1	Aiding Indian allottees, under act of February 8, 1887 (reimbursable)	$7,084.07	$1,500.00
2	Allotments, under act of February 8, 1887 (reimbursable)	.....	65,108.80
3	Asylum for Insane Indians, Canton, S. Dak.	.....	147.31
4	Buildings at agencies, and repairs	934.59	23,305.18
5	Care and protection of Indian timberlands	.....	2,478.60
6	Civilization fund	9,935.57	35,671.16
7	Contingencies, Indian Department	112.17	1,116.23
8	Experiments, Indian school or agency farms	.....	59.55
9	Fulfilling treaties with Sioux of different tribes, including Santee Sioux of Nebraska	37.50	.....
10	General expenses, Indian Service	.....	2,086.61
11	Incidental expenses of Indian Service in Utah Territory	399.54	.....

Schedule no.	Name of appropriation or fund	Direct	Jointly with other Indians
12	Incidental expenses of Indian Service in Wyoming	4,022.44	14,082.19
13	Incidentals in Wyoming	.....	13,672.66
14	Increase of compensation, Indian Service	8,534.30	31,745.73
15	Indian agency buildings	.....	6,296.94
16	Indian boarding schools	.....	65,136.45
17	Indian school buildings	10,159.85	5,124.30
18	Indian school and agency buildings	1,402.93	44,654.97
19	Indian school, Carlisle, Pa	500.59	.....
20	Indian school, transportation	.....	944.79
21	Indian schools in States	1,155.18	.....
22	Indian schools in States: Support	493.50	.....
23	Indian schools: Stock cattle	.....	455.00
24	Indian schools: Support	20,439.63	100,061.09
25	Industrial work and care of timber	48.69	101,259.08
26	Judgments, Indian depredation claims	1,400.00	.....
27	Maintaining peace among and with the various tribes and bands of Indians	4,457.34	4,758.50
28	Negotiating with Indians for lands	.....	299.38
29	New allotments, under act of February 8, 1887 (reimbursable)	.....	92.00
30	Pay of farmers	.....	42,221.79
31	Pay of Indian agents	.....	35,095.70
32	Pay of Indian police	4,570.48	94,224.13
33	Pay of interpreters	11,396.17	652.32
34	Pay of judges, Indian courts	.....	5,057.01
35	Pay of matrons	.....	9,146.50
36	Pay of superintendents and agents	1,105.25	10,510.69
37	Presents and provisions to Indians	125.00	.....
38	Purchase and transportation of Indian supplies	15,175.39	59,324.87
39	Relieving distress and prevention, etc., of diseases among Indians	.....	2,128.51
40	Stock cattle for Indian industrial schools	.....	2,872.50
41	Support of Arapahoes, Cheyennes, Apaches, Kiowas, Comanches, and Wichitas	.....	7,000.00
42	Support of Indian schools	.....	13,356.03
43	Support of schools not otherwise provided for	.....	493.22
44	Suppressing liquor traffic among Indians	.....	81.40
45	Surveying and allotting Indian reservations	.....	1,103.73
46	Surveying and allotting Indian reservations (reimbursable)	.....	50,119.84
47	Survey of Indian reservations	.....	1,057.60
48	Telegraphing and telephoning, Indian Service	.....	47.55
49	Telegraphing and purchase of Indian supplies	.....	165.10
50	Telegraphing, transportation, etc., Indian supplies	3,481.42	21,923.49
51	Transportation of Indian supplies	59,205.68	180,221.48
52	Vaccination of Indians	12.00	217.00
		166,189.28	1,057,076.98

26. All of the charges made directly against plaintiff tribe totaling $166,189.28, except $12,294.73 thereof, represented expenditures after the advent of the Arapahoe Indians upon the Shoshone Reservation. Of the last-mentioned amount of $12,294.73 charged directly against the plaintiff, the amount of $7,510.31 represented expenditures for purposes in the benefits of which the Bannock Tribe

shared equally with plaintiff during the time that tribe lived on the Shoshone Reservation. The population of the Bannock Tribe during the period they shared in expenditures for the Shoshones was 800 and that of plaintiff tribe during that time was 2,400. The amount of $4,784.42 of the above-mentioned $12,294.73 represented that portion of the total expenditure of $166,189.28 disbursed and charged directly against the plaintiff tribe before the [fol. 77] Arapahoe Tribe of Indians moved to the Shoshone Reservation. The Arapahoe Indians shared equally with the Shoshones in the benefits of $127,661.58 of the total expenditures charged directly to plaintiff for the purposes specified in items 4, 7, 14, 17, 18, 24, 26, 38, 50, 51, and $6,815.62 of item 33 of the above-mentioned tabulation.

27. The direct charges made against the plaintiff tribe out of expenditures for the period mentioned for purposes in which the Arapahoe Tribe did not share equally with the Shoshones total $38,527.70. Of the last-mentioned amount $7,510.31 represented expenditures for the benefit of the plaintiff tribe of Indians and the Bannock Indians jointly and on the basis of population of these two tribes during the time the Bannock Indians were on the Shoshone Reservation the amount of $2,503.44 represented the share of the Bannock Indians, leaving a total direct expenditure for the benefit of the plaintiff tribe of Indians, in the benefits of which neither the Bannocks nor the Arapahoes shared, of $36,024.26. The defendant is entitled to offset this amount against plaintiff.

28. With respect to the above-mentioned sum of $127,661.58, being that portion of the disbursements of $166,189.28 charged directly against the plaintiff tribe for purposes in the benefits of which the Arapahoes shared equally with the Shoshones, the defendant is entitled to an offset against plaintiff in the amount of $63,958.45 on the basis of the average annual population of plaintiff tribe to the total population of both tribes in the proportion of 50.18 percent for the Shoshones for the period 1878 to 1927, inclusive.

29. During the period July 1, 1867, to June 30, 1927, the United States appropriated and expended for the benefit of plaintiff tribe jointly with the Bannock and the Northern Arapahoe tribes on the Shoshone Reservation a total

of $1,057,076.98 which included the amount of $116,820.84 made reimbursable by the Act of February 8, 1887, but which amount has not been repaid.

The amount of $32,502.52 of the total joint charges of $1,057,076.98 represented expenditures made for the joint benefit of plaintiff and the Bannock tribes during the years July 1, 1867, to the fiscal year 1876, inclusive. The records are such that it is now impossible to determine what portion of this amount of $32,502.52 should be charged to plaintiff tribe. However, both tribes shared equally in the benefits, and, on the population basis, the plaintiff tribe should be charged with $10,834.17. The defendant is entitled to an offset of this amount in respect of this item.

On the basis of percentage of population of plaintiff tribe in each year during the period 1878 to 1927, inclusive, the defendant is entitled to an offset of $511,791.92 in respect of expenditures totaling $1,024,574.46 charged jointly to plaintiff and the Arapahoe Tribe.

30. During the fiscal years 1882 to 1921, inclusive, gratuity disbursements were made out of appropriations in the total sum of $4,147,322.55 for the benefit of the Shoshone and the Arapahoe tribes of Indians on the Shoshone Reservation in Wyoming. The sum of $611,842.22 of this amount was charged directly against the plaintiff tribe and $3,535,480.33 was charged against the Northern Arapahoe and plaintiff tribes jointly. The purposes for which these disbursements were made and the direct and joint charges were as follows:

[fol. 78]

Item nos.		Direct	Jointly with Northern Arapahoe Tribe of Indians	Totals
1	Agency buildings and repairs	.....	$4,213.97	$4,213.97
2	Agricultural aid	.....	636.01	636.01
3	Agricultural implements and equipment	$34,845.52	10.00	34,855.52
4	Care of livestock	502.72	.....	502.72
5	Clothing	6,153.19	.....	6,153.19
6	Education	1,791.34	1,004,350.43	1,006,141.77
7	Erection and repairs of mills and shops	1,771.66	.....	1,771.66
8	Feed for livestock	20,343.76	.....	20,343.76
9	Fencing and breaking land	7,736.09	.....	7,736.09
10	Fuel and light	18,324.15	.....	18,324.15
11	Hardware, glass, oils, and paint	14,360.58	465.16	14,825.74
12	Household equipment	5,888.66	.....	5,888.66
13	Irrigation	.....	2,264,123.00	2,264,123.00
14	Livestock	3,610.00	.....	3,610.00

Item nos.		Direct	Jointly with Northern Arapahoe Tribe of Indians	Totals
15	Medical attention	9,149.42	.....	9,149.42
16	Miscellaneous agency expenses	15,426.91	5.49	15,432.40
17	Miscellaneous building material	1,844.07	.....	1,844.07
18	Miscellaneous employes	25,443.75	.....	25,443.75
19	Pay of herders	1,391.82	.....	1,391.82
20	Presents	16.75	.....	16.75
21	Provisions and other rations	416,550.91	.....	416,550.91
22	Roads and bridges	15,650.31	250,455.07	266,105.38
23	Seeds	7,014.10	.....	7,014.10
24	Surveying	.....	1,400.00	1,400.00
25	Telephone line	.....	699.70	699.70
26	Transportation, etc., of supplies	4,026.51	.....	4,026.51
27	Payment to settlers	.....	9,121.50	9,121.50
		611,842.22	3,535,480.33	4,147,322.55

31. With reference to the amount of $611,842.22 charged directly against plaintiff, as above mentioned, the amount of $96,847.94 under items 7, 10, 11, 16, 17, 18, 22, and 26 of the above tabulation represented the total of disbursements directly charged to plaintiff for facilities and services in the benefits of which the Northern Arapahoe Indians shared equally with plaintiff tribe, and for which the record does not show any direct charge against the Northern Arapahoe Indians, leaving a balance of $514,994.28 which the defendant is entitled to offset against plaintiff.

With respect to the above-mentioned amount of $96,847.94, the defendant is entitled to offset against plaintiff the amount of $49,198.75 on the basis of the average annual population of plaintiff tribe of 50.8 percent during the period 1882 to 1921, inclusive.

32. In the expenditures for the benefit of and charged jointly to plaintiff tribe and the Northern Arapahoe Tribe in the sum of $3,535,480.33, which was disbursed during the period July 1, 1882, to June 30, 1927, there was included disbursements of $235,963.07 during the years 1913 to 1927, inclusive, for roads and bridges on the Shoshone Reservation, which was made reimbursable by the acts authorizing such expenditures.

By the act of July 1, 1932 (47 Stat. 564), it was provided: "That the Secretary of the Interior is hereby authorized and directed to adjust or eliminate reimbursable charges of the Government of the United States existing as debts against individual Indians or tribes of Indians in such a

way as shall be equitable and just in consideration of all the circumstances under which such charges were made. * * * Provided further, That any proceedings hereunder shall not be effective until approved by Congress unless Congress shall have failed to act favorably or unfavorably thereon by concurrent resolution within sixty [fol. 79] legislative days after the filing of said report, in which case they shall become effective at the termination of the said sixty legislative days."

On December 15, 1932, the Secretary of the Interior reported to Congress that the outstanding indebtedness for roads and bridges on the Shoshone Reservation was $131,492.50 and recommended that the entire amount of the unpaid reimbursable balance he canceled. Congress not having disapproved this recommendation within sixty legislative days after December 1932, the outstanding reimbursable balance was no longer a charge against the Shoshone Tribe of Indians, as appears from the statement of the Commissioner of Indian Affairs of July 10, 1933, that "In accordance with the terms of the act of July 1, 1932, this sum is no longer regarded as a reimbursable charge against the tribal funds."

The aforementioned expenditures of $3,535,480.33 also included disbursements for "Irrigation System, Wind River Diminished Reservation, Wyoming", totaling $2,264,123, made during the period 1906 to 1927 and more than one-half of which was expended in the years 1918 to 1925. Of this last-mentioned amount, expenditures totaling $1,582,285.25 were made reimbursable by the appropriation acts under which that amount was expended.

33. Allotments of land on the diminished reservation were made to the Shoshone and Arapahoe Indians in severalty and during the period 1907 to 1919, 245,058 acres had been allotted. By the act of August 1, 1914, 38 Stat. 582, it was provided that the costs of irrigation systems incurred by the Government, before or after the date of the act, were to be assessed against the landowners who were to receive the benefits of the irrigation. Under this act the cost of such irrigation development was transferred from the tribe to the individual Indian allottee having irrigable land under any project on the reservation. The act pro-

vided that "all moneys expended heretofore or hereafter under this provision shall be reimbursable where the Indians have adequate funds to repay the Government, such reimbursements to be made under such rules and regulations as the Secretary of the Interior may prescribe." Apportionment of such irrigation construction cost was directed by the act of February 14, 1920, 41 Stat. 408, and the apportionment was made and approved by the Department. That act provided that "The Secretary of the Interior is hereby authorized and directed to require the owners of irrigable land under any irrigation system heretofore or hereafter constructed for the benefit of Indians and to which water for irrigation purposes can be delivered to begin partial reimbursement of the construction charges, where reimbursement is required by law, at such times and in such amounts as he may deem best; all payments hereunder to be credited on a per-acre basis in favor of the land in behalf of which such payments shall have been made and to be deducted from the total per-acre charge assessable against said land."

In order to insure the United States reimbursement for the advancement of money for the construction, operation, and maintenance of irrigation projects on the Shoshone Reservation, Congress, by the act of March 7, 1928 (45 Stat. 210), created a lien on the land of allottees under the [fol. 80] Shoshone Indian irrigation projects. This act provided as follows: "That the costs of irrigation projects and of operating and maintaining such projects, where reimbursement thereof is required by law, shall be apportioned on a per-acre basis against the lands under the respective projects and shall be collected by the Secretary of the Interior as required by such law, and any unpaid charges outstanding against such lands shall constitute a first lien thereon which shall be recited in any patent or instrument issued for such lands."

In accordance with the provisions of these acts the cost of irrigation projects on the Shoshone Reservation has been apportioned.

The Superintendent of the Indian Field Service reported on June 17, 1931, that "The cost of the irrigation project constructed for Indians on the Shoshone or Wind River Reservation has been apportioned in accordance with the benefits received by each individual Indian so far as practicable against such Indians on a per-acre basis against

the lands under the respective projects, and the unpaid charges outstanding against such lands constitute a first lien thereon."

On July 3, 1931, the Commissioner of Indian Affairs stated of record in this case with reference to expenditures for irrigation involved in the case at bar that "the statements contained in Superintendent Haas' letter * * * are in accord with the facts. Prior to the act of August 1, 1914 (38 Stat. 582), the cost of irrigation work on this reservation was payable out of tribal funds. By that act the cost was shifted from the tribal burden to that of the individual Indian or allottee having irrigable land under the project on that reservation. The equitable way of distributing costs is by taking the acreage under a unit or a project and dividing same into the cost of the works, thereby giving the per-acre assessment of charge against each acre of land under the particular unit or project. This method is consistent with usual practice and works the greatest equity to all under the project. Apportionment of construction costs was directed by the act of February 14, 1920 (41 Stat. 408). The act of March 7, 1928 (45 Stat. 202), created a lien against lands of the Shoshone Indian irrigation project, which lien is recited in patents issued for irrigable lands thereunder prior to the payment of the share of the cost of the irrigation work."

34. The elimination of the item of $2,264,123 for irrigation and $235,936.07 for roads and bridges, totaling $2,050,086.07, from the total expenditure of $3,535,480.33 made during the period July 1, 1881, to June 30, 1927, for the joint benefit of the Northern Arapahoe and plaintiff tribes, leaves $1,035,394.26, and from this sum there should be further eliminated the item of "Payment to settlers", set forth in item 27 of the tabulation above, amounting to $9,121.50, representing payments made by the United States to persons who had settled upon the Shoshone Reservation in order to obtain their removal therefrom; this leaves a balance of $1,026,272.76 in respect of which the defendant is entitled to offset against the plaintiff tribe the amount of $508,005.02, on the basis of the average annual population of plaintiff tribe of 49.5 percent to the total population of both tribes during the period 1884 to 1927, inclusive.

The total amounts of $2,264,123 and $235,963.07 expended for irrigation and roads and bridges, respectively, under

[fol. 81] specific appropriations for the joint benefit of plaintiff tribe and the Northern Arapahoe Tribe of Indians were expended in the years and in the amounts following:

Year	Irrigation	Roads and bridges
1906	$25,000.00	
1907	75,952.57	
1908	111,824.53	
1909	103,430.97	
1910	83,209.13	
1911	114,368.77	
1912	48,617.26	
1913	26,675.81	$486.97
1914	52,216.58	9,511.97
1915	53,002.57	24,845.02
1916	25,195.48	24,943.23
1917	55,796.69	24,683.09
1918	141,738.50	24,986.18
1919	160,175.82	19,628.09
1920	353,057.98	23,753.99
1921	145,604.63	14,994.31
1922	74,460.54	11,163.03
1923	98,989.34	14,999.19
1924	215,215.49	19,749.26
1925	196,576.06	8,796.12
1926	48,972.54	7,493.82
1927	54,041.74	5,928.80
	2,264,123.00	235,963.07

Conclusion of Law

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court decides as a conclusion of law that the plaintiff is entitled to recover $2,483,467.99.

The defendant on its counterclaim is entitled to offset against the claim of the plaintiff the amount of $1,689,646.50, leaving a balance of $793,821.49.

It is therefore adjudged and ordered that the plaintiff recover of and from the United States seven hundred ninety-three thousand eight hundred twenty-one dollars and forty-nine cents ($793,821.49).

OPINION

LITTLETON, Judge, delivered the opinion of the court:

The Jurisdictional Act, under which this suit was instituted, was approved March 3, 1927, 44 Stat. 1349. It conferred jurisdiction upon this court, with right of appeal to the Supreme Court by either party, to hear, examine, adjudicate, and render judgment in any and all legal and equitable claims which the Shoshone Tribe of Indians of the Wind River Reservation in the State of Wyoming might have against the United States arising under or growing out of the treaty of July 3, 1868, or arising under or growing out of any subsequent treaty or agreement between said Shoshone Tribe and the United States or any subsequent act of Congress affecting the tribe which claims have not heretofore been determined and adjudicated upon their merits by this court or the Supreme Court. In section 3 it was provided that "In said suit the court shall also hear, examine, and adjudicate any claims which the United States may have against said tribe, but any payment, including gratuities which the United States may have made to said tribe, shall not operate as an estoppel but may be pleaded as an offset in such suit: Provided, however, That the United States may interpose to such suit or action any and all pleas of defense, affirmative and negative, legal and equitable, which it may have thereto not herein specifically barred by the provisions of this act. In reference to all claims which may be the subject matter of the suits herein authorized, the decree of the court shall be in full settlement of all damages, if any, committed by the Government [fol. 82] of the United States and shall annul and cancel all claim, right, and title of the said Shoshone Indians in and to such money, lands, or other property."

1. Several questions are presented which will be discussed in the order of their importance. The first question is whether the United States violated the treaty of July 3, 1868, with plaintiff tribe by placing the Northern Band of Arapahoe Indians upon the Shoshone Reservation, and the determination of this question depends upon whether the plaintiff tribe was willing, with the consent of the United States, to admit the Arapahoe Indians amongst them, as provided in art. 2 of the treaty with the Shoshone Tribe.

The evidence as a whole shows very clearly that the plaintiff tribe did not at any time express its willingness or give its consent to admit the Arapahoe Indians amongst them on the Shoshone or Wind River Reservation within the meaning of this provision of the treaty, and that the plaintiff tribe and the United States did not consent to this arrangement in the manner contemplated by the treaty. This provision of the treaty defining the reservation and providing that the territory "shall be and the same is set apart for the absolute and undisturbed use and occupation of the Shoshone Indians herein named, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them" is the well-known provision inserted in practically all of the treaties made with many Indian tribes about the date on which the treaty with plaintiff tribe was made; and it was well understood, we think, by the Indians concerned and the United States that no other tribe or band of Indians was to be given any rights to or upon the described reservation or permanently settled thereon to live amongst the tribe with which the treaty was made, unless such tribe for whom the reservation was set apart should be willing, with the consent of the United States, to admit other friendly tribes or individual Indians to live amongst them upon the reservation and to use, occupy, and enjoy the reservation and all its facilities or to use, occupy, and enjoy some portion of the reservation equally with the Indians belonging to the tribe with whom the treaty was made. The plaintiff tribe so understood the provisions in question from the date the treaty was made, and the course of dealings between the various Indian tribes and the United States in similar matters has been consistent with this understanding. The usual procedure followed by the United States and Indian tribes in complying with like provisions affecting tribes in treaty relations with the United States was to obtain the expression of a majority of the male adult Indians concerned. A number of instances could be cited where this procedure has been consistently followed in dealings between the Government and other Indian tribes, but we deem it necessary to cite only a few instances in which the Congress, in statutory enactments, has given recognition to the desirability of the consent of the Indian tribe affected being obtained.

In sections 5 and 6 of the act of May 17, 1882, 22 Stat. 68, 88, and likewise in the acts of July 4, 1884, 23 Stat. 76, and of March 3, 1885, 23 Stat. 362, it was provided that "where Indians are located on reservations created by Executive [fol. 83] order he [the President] may, with the consent of the tribes to be affected thereby, expressed in the usual manner, consolidate one or more tribes, and abolish such agencies as are thereby rendered unnecessary." It was further provided in these acts that "the several appropriations made for millers, blacksmiths, engineers, carpenters, physicians, and for other purposes, and for various articles provided by treaty stipulations for the several tribes of Indians, may be diverted to other uses for the benefits of said tribes, respectively, within the discretion of the President and with the consent of the said tribes expressed in the usual manner."

In the act of August 19, 1890, 26 Stat. 336, making appropriations for the Northern Cheyennes and Arapahoes for the fiscal year 1891, an amount was appropriated to enable the President to appoint a commission with authority to negotiate with the Northern Band of Cheyenne Indians on the Tongue River Reservation and in the vicinity of Montana, and with the Northern Band of Cheyennes on the Pine Ridge Reservation in South Dakota for the removal of said Northern Bands of Cheyenne Indians to a permanent settlement upon any of the existing reservations, and "to negotiate with any other tribes or bands of Indians for such portion of their reservation as may be necessary for the permanent settlement of the said Northern Bands of Cheyennes, as herein contemplated; * * * but no agreement shall take effect until ratified by Congress."

In February 1870 the Department of Indian Affairs endeavored to obtain the consent of the plaintiff tribe to admit the Northern Band of Arapahoe Indians amongst them, but such consent was refused, and these Indians, which had come to the Shoshone Reservation to treat with the Shoshones for a home, were later removed by the Government to old Ft. Casper. Again, in June 1879, after the Northern Band of Arapahoes had been brought back to the Shoshone Reservation and settled thereon without the consent of the Shoshones, as hereinafter discussed, the office of Indian Affairs of the Interior Department wrote James I. Patten, Indian agent for the Shoshones, that it was desired to have

Ten Doy and his band of Lemhi Indians located "on your reservation, provided your Indians will give their assent to the same. You will therefore without delay call a council of the Indians and submit the matter to them, with such explanations and facts as you may deem best, in order to obtain their consent, and report the result." Such a council was called. The Shoshones refused to give their consent, whereupon Patten reported to the Commissioner of Indian Affairs that "their consent to the proposal of the Department to transfer those Indians to this reservation could not be obtained, and the council adjourned."

2. The next question is whether the plaintiff tribe expressed its willingness or gave its consent to admit the Northern Band of Arapahoe Indians amongst them in such manner as would conform to art. 2 of the Treaty of 1868 and preclude them from having a just claim for compensation because of the placing of the Arapahoe Indians upon their reservation with equal rights with the Shoshone Indians. We think they did not so consent. The material facts with reference to this feature of the case have been gathered from the entire record, mostly documentary, and have been set forth in the findings and need not be repeated here. Counsel for the defendant base their contention that the Shoshone Indians consented to admit the Arapahoe Indians amongst them upon isolated statements taken from certain [fol. 84] letters and reports of Indian agents for the Shoshone Reservation, some of whom went there many years after the Arapahoes were brought upon the reservation and were not familiar with the past history of the matter, and upon the absence of any statement in the annual reports of the Commissioner of Indian Affairs subsequent to 1878 of any friction between the two tribes or of any protest on the part of the Shoshones to the presence on the reservation of the Northern Arapahoes. These contentions of counsel for the defendant fail to find support for the purposes for which made when considered in the light of the whole record. For the most part such statements indicate merely that there had been no hostilities between the tribes and that both tribes were living upon the reservation in a peaceful manner. Although the two tribes had been traditional enemies, the Northern Arapahoes having been allied with the Sioux and Cheyennes, the Shoshones had agreed to make peace with the Arapahoes and they were noted for

keeping and fulfilling their agreements. The two tribes have never been very friendly. The record is replete with protests by the Shoshones to the presence of the Arapahoes upon their reservation from the time they were brought there in 1878 until the present time. The only consent the Shoshones ever gave to the presence of the Arapahoes upon their reservation was at the time the Arapahoes were first brought to the reservation under military escort; they were then told that they might remain there for a short time to rest and feed their horses but that they should remove from the reservation as soon as possible.

The fact that the annual reports of the Commissioner of Indian Affairs for 1878 and subsequent years make no reference to the protests and objections of the Shoshones to the Arapahoes sharing their reservation is not, we think, important in view of the fact that the files of the Indian Office in Washington contained written reports definitely stating the position of the Shoshones with reference to the matter. The office of the Commissioner of Indian Affairs had consistently ignored the many reports of Indian Agent Patten stating the position of the Shoshones and asking for instructions. It is worthy of note, however, that in his report as late as 1899 the Commissioner of Indian Affairs, at page 379, stated that "This fall the Shoshones will receive the last installment of their treaty supplies and will be without further support, while the Arapahoes, presumably, will still be supplied under the provisions of the Black Hills Agreement. This discrimination will create dissatisfaction and arouse the jealousy of the Shoshones, *who have never been very friendly with the Arapahoes, whose joint occupancy of this reservation they regard as an intrusion.*" (Itals. supplied.) This statement of the Commissioner of Indian Affairs succinctly states the position which the plaintiff tribe took from the time the Arapahoes were first brought to the Shoshone Reservation in 1878.

The record discloses that the Northern Arapahoe Indians were brought from old Ft. Casper under military escort to the Shoshone Reservation in Wyoming in the winter of 1877-78, as a result of the belief of the Commissioner of Indian Affairs that the Shoshone Indians had given their consent to admit the Arapahoes amongst them on their reservation when such was not the case. This error grew out of the misunderstanding by the Indian Office of the tele-

[fol. 85] gram of James Irwin, who had been sent to counsel with the Shoshone Indians with a view to obtaining their consent to admit the Arapahoes amongst them. Irwin did not obtain such consent from the Shoshones, but obtained an agreement with them to make peace with the Arapahoes. Accordingly, on October 17, 1877, Irwin dispatched a telegram to the Commissioner of Indian Affairs in which he stated that he had "held counsel and made peace between Shoshones and Arapahoes." This the Commissioner of Indian Affairs evidently construed at the time as meaning that the Shoshones had consented to the permanent settlement of the Arapahoes upon the Shoshone Reservation, for, in his annual report dated November 1, 1877, the Commissioner of Indian Affairs stated at page 416 that "In accordance with their earnest request made to the President during the recent visit of the delegation in this city, permission was given the Northern Arapahoes to join the Shoshones on the Wind River Reserve in Wyoming. In a formal council held last month by Agent Irwin with the Shoshones, their consent to the arrangement desired by the Arapahoes was obtained, and the removal of the latter is now in progress." This erroneous position of the Commissioner of Indian Affairs was afterwards made the basis of a definite ruling in August 1891 by that official that the Shoshones had equal rights to the reservation which did not depend upon the further consent of the Shoshones. It appears that there was a conflict between Agent Irwin and the Commissioner of Indian Affairs as to their understanding of what the delegation of Northern Arapahoes requested of the President and what the President promised them upon their visit to Washington late in September or early in October 1877. Agent Irwin, who accompanied the delegation to Washington with his own interpreter, appears to have been in a better position to understand what was requested and promised than was the Commissioner of Indian Affairs. Agent Irwin proceeded to carry out the arrangement as he understood it. That matter is only of importance now as throwing light upon the reason for the permanent settlement of the Northern Arapahoe Indians upon the Shoshone Reservation without the consent of the Shoshone Tribe.

3. The next question concerns the date on which the Government took an interest in the Shoshone Reservation for

the Northern Band of Arapahoe Indians. Counsel for the defendant contend that this occurred on March 18, 1878, when the first group, consisting of certain chiefs and headmen of the Northern Band of Arapahoes, arrived at the agency upon the reservation and had a conference on the following day with Chief Washakie and other Shoshone Indians, as set forth in the findings. On the other hand, the plaintiff contends that the Arapahoe Indians were brought to and placed upon the reservation as a result of the errors and misunderstandings hereinbefore mentioned, and that this was done by the officials of the Government, who were without authority to act for the Government in that regard; and that, since no action was taken by the President or the Congress approving or ratifying what the Commissioner of Indian Affairs, with the acquiescence of the Secretary of the Interior, had done, there was no legal taking of any title or interest which the Shoshone Indians had in the reservation under their treaty of 1868 for the benefit of the Arapahoes until the enactment of the Jurisdictional Act of March 3, 1927, under which act this suit was brought; that [fol. 86] from 1878 to March 3, 1927, the Arapahoe Indians were simply intruders upon the reservation whom the Government failed and refused to remove. Plaintiff tribe therefore contends that it is entitled to recover compensation for the value of the use and occupancy of the reservation by the Arapahoes from 1878 to 1927 and to recover the value of a one-half undivided interest in the reservation on the latter date. We are of opinion that the Government, through the Commissioner of Indian Affairs, who by statute was charged with the management of all Indian affairs and all matters arising out of Indian relations under direction of the Secretary of the Interior, and agreeably to such regulations as the President might prescribe, took from the plaintiff tribe an undivided one-half interest in all property and property rights to which they were entitled by law for the benefit of the Northern Band of Arapahoe Indians; and that this action of the Government; acting through the Commissioner of Indian Affairs, occurred on August 13, 1891, when that official definitely held that "this office holds that the Arapahoes have equal rights to the land on the said reservation which does not depend upon the further consent of the Shoshones." (Finding 11.) Prior to that time—that is, from the period March 18, 1878, until August 1891—the Arapahoes simply resided upon, used, and occupied the

reservation equally with the Shoshones as a result of the errors and misunderstandings by the officials charged by law with the management of all Indian affairs as to the willingness and consent of the Shoshones to admit the Arapahoes amongst them, without any definite action having been taken in regard to the matter when the error was first called to the attention of the proper officials.

Prior to August 1891, the whole matter of the presence of the Arapahoes on the Shoshone Reservation was in a state of uncertainty. The record shows that the Shoshones desired and believed that the Government would finally provide a separate reservation for the Arapahoes, as the Shoshones had been advised would be done, and the Arapahoes were uncertain as to their rights upon the reservation and as to what would ultimately be provided for them. As late as March 30, 1886, the Arapahoes petitioned the Commissioner of Indian Affairs through Thomas M. Jones, then Indian Agent for the Shoshone Reservation, with reference to the uncertainty of their tenure. On that date Jones advised the Commissioner of Indian Affairs that "I am requested by the leading men of the Arapahoe Indians to state that they feel extremely uneasy in regard to their future prospects in view of a proposed bill before Congress respecting Indian lands. They fear that as Washakie, the chief of the Shoshones (so far as they can learn), has never surrendered on behalf of his tribe any of the land rights, to them, but has simply given his consent to the Arapahoes living here, and in case of passage of such an act, the law will fix it that this land belongs solely to the Shoshones and hence that they will be left out on this reservation and also on the one they came from." The Department instructed Agent Jones to inform the Arapahoes that they would be taken care of.

The Commissioner of Indian Affairs, under section 2, U. S. Code, title 25, is charged with the management for the Government of all Indian affairs and of all matters arising out of Indian relations and that section provides that "the Commissioner of Indian Affairs shall, under the [fol. 87] direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs and of all matters arising out of Indian relations." This court has held that the action of the Commissioner of Indian

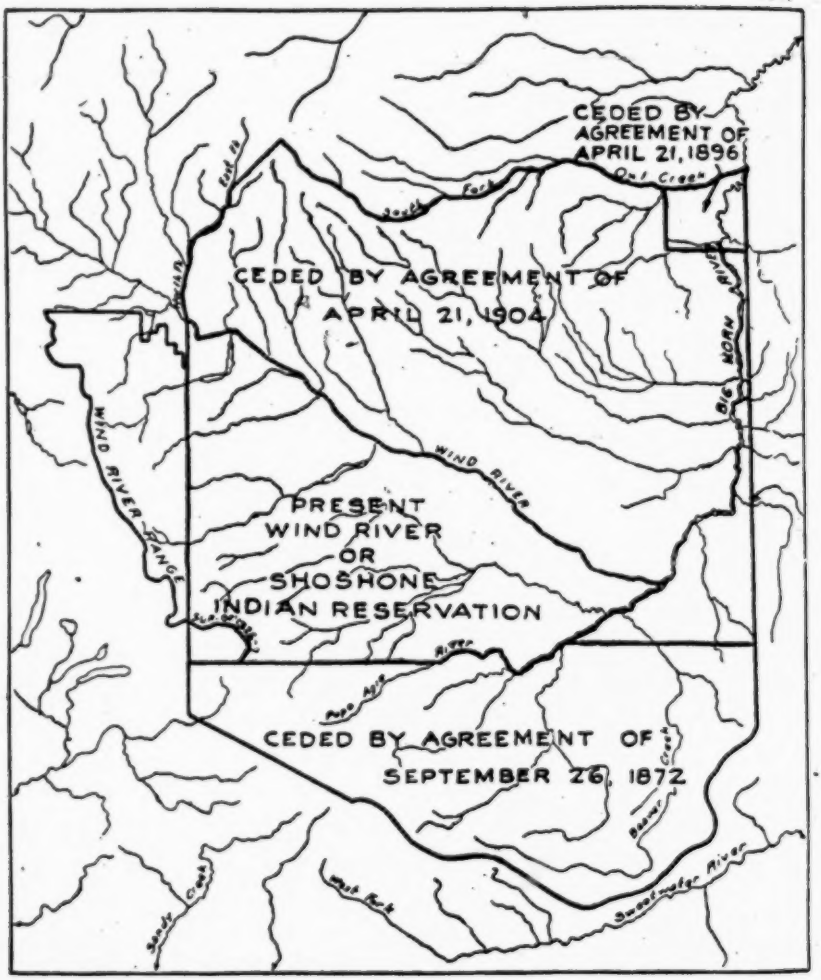
Affairs must be presumed to be the action of the President. Belt's, Executrix, v. The United States, 15 C. Cls. 92. Although the Commissioner of Indian Affairs placed the Arapahoes on the Shoshone Reservation without the consent of the Shoshone Tribe and violated art. 2 of the treaty of 1868 in keeping them upon the reservation over the protest of the Shoshones, and in finally holding that they had rights thereto equal with the Shoshones, he nevertheless was the duly designated and authorized officer to represent the Government in such matters. When the facts as to what had been done were clearly placed before Congress, bills giving this court jurisdiction to determine the rights of the Shoshones in the premises were introduced and recommended for passage from 1912 until the act of March 3, 1927, was finally enacted. This Jurisdictional Act was not, in our opinion, a taking by the Government from the plaintiff tribe of an interest in their reservation for the benefit of the Arapahoes. Its intent and purpose, we think, was only to provide a forum in which the claims of the plaintiff tribe against the United States could be heard and adjudicated. Its only effect, at most, was to ratify what had been done by the Commissioner of Indian Affairs and to place the plaintiff tribe in a position to have its claims adjudicated according to law. The Mille Lac Band of Chippewas v. The United States, 47 C. Cls. 415, 436, affirmed 229 U. S. 498, 500. The Jurisdictional Act makes no admission of liability, or of any ground of liability, on the part of the Government, but merely provides a forum for adjudication of claims according to applicable legal principles. It authorizes this court to hear, examine, adjudicate, and render judgment in any and all legal and equitable claims which the Shoshone Tribe may have against the United States. The act contains no language which can be construed as a taking, at the time of its enactment, of any right, title, or interest of the plaintiff tribe to any lands, monies, or other properties to which they may have been entitled under the Treaty of 1868 or any subsequent agreement or act of Congress, nor does it contain any language indicating a purpose to fix any definite time or date on which any property of the Shoshones, of which they may have been wrongfully deprived, should be valued. We think that if Congress had intended that the Jurisdictional Act be interpreted as the taking of lands

and other properties of the Shoshones for the benefit of the Arapahoes, it would have used language sufficiently clear to manifest that purpose. In Crozier v. Fried. Krupp Aktiengesellschaft, 224 U. S. 290, it was held that "The adoption by the United States of the wrongful act of an officer is of course an adoption of the act when and as committed, and causes such act of the officer to be, in virtue of the statute, a rightful appropriation by the Government, for which compensation is provided." In that case the court was construing the act of 1910 authorizing suits against the United States for patent infringement, and the issue involved a patent which had been used without permission of the owner by an officer of the United States prior to the passage of that act. Moreover, the rules with reference to condemnation proceedings and the taking of private property for public use are not entirely applicable to cases such as the one at bar. The Indian tribes were [fol. 88] under the control, care, and protection of the United States and, although they could not legally be deprived of any property secured to them by treaty, agreement, or act of Congress, the legal title to lands embraced in reservations set apart for the absolute and undisturbed use and occupancy of Indians remained in the United States. In these circumstances we think the acts of the Commissioner of Indian Affairs, who was the official directly charged with the administration and management of all Indian affairs, may properly be said to have been the acts of the Government. For the reasons stated, it is our opinion that an undivided one-half interest in plaintiff's reservation was taken from them for the benefit of the Northern Band of Arapahoes on August 13, 1891, and that the plaintiff tribe is entitled to recover the value of an undivided one-half interest in the reservation on that date.

4. The foregoing conclusion makes it necessary for the court to fix the value of an undivided one-half interest in the reservation of 2,343,540 acres. After a careful consideration of the character of the land embraced within this area, its fertility, the water supply well situated and suitable for irrigation purposes, and all other factors entering into the question of value in which the Indians were at that time the beneficial owners, such as timber, coal, oil and gas, phosphate, and gypsum, and fees from grazing

leases, we have fixed the fair and reasonable value of a one-half undivided interest in the reservation on August 13, 1891, at $1.75 an acre, or $2,050,597.50. The greater portion of the lands embraced within this reservation was very fertile and unusually well adapted for farming, by reason of the adequate supply of water well situated for use for irrigation purposes. The reservation also embraced a very large area of fine grazing land from which considerable income was being derived from grazing leases. It contained approximately one billion board feet of excellent timber and portions of the reservation were underlaid with a large quantity of bituminous coal. In 1891, however, no coal of any consequence had been mined, due to lack of demand therefor. The reservation also had railroad facilities. It contained a large, but undetermined, quantity of oil and gas. All of these matters are of great importance in the determination of the value of the land in 1891, since, at that time, the plaintiff tribe was entitled to the net proceeds derived from the reservation from all sources under the act of March 3, 1883, 22 Stat. 590, which provided that "The proceeds of all pasturage and sales of timber, coal, or other product of any Indian reservation, except those of the Five Civilized Tribes, and not the result of the labor of any member of such tribe, shall be covered into the Treasury for the benefit of such tribe under such regulations as the Secretary of the Interior shall prescribe." The oil and gas reserves alone were of great value in 1891. The Government, for the purpose of this suit, fixed the 1926 present value of these reserves at $6,000,000. It is believed that a tracing of the Shoshone or Wind River Reservation showing its boundaries and the rivers which run through it, the areas ceded to the Government, outright and in trust for the Indians, and the present diminished reservation of 808,500 acres, will be helpful in the consideration of value in the light of the facts hereinbefore set forth in the findings. Such a tracing follows:

[fol. 89]



[fol. 90] Net income has been steadily derived from various sources on the reservation under the above-quoted statute, and similar statutes subsequent thereto, with the result that for the period of 42 years from 1885 to 1927 net proceeds totaling $1,628,744.56 were derived from the reservation and deposited in the Treasury to the credit of the Arapahoe and plaintiff tribes. In addition to these matters affecting value, the facts show that in April 1896, about five years after the Government definitely took an undivided one-half interest in the reservation for the benefit of the Arapahoes, the United States purchased 55,040 acres on the northern boundary of the reservation, for which it

paid $60,000, or slightly more than one dollar an acre. This area contained no minerals or oil and gas. From 1885 to 1927 the proceeds derived by the Indians upon this reservation from cessions and net income from products of the reservation totaled $2,003,590.90, all of which the plaintiff tribe would have owned had not a one-half interest in the reservation and all proceeds therefrom been taken by the Government for the Northern Arapahoes. The above amount does not include the amount received under the cession of 1872.

In 1872, nineteen years prior to the controlling date in 1891, the plaintiff tribe ceded a large tract of land, mostly in the mountainous regions of the reservation, to the Government for about four cents an acre, and counsel for defendant rely upon the price paid for this cession as fixing the value of all other lands on the reservation. It is clear from the facts, however, that this purchase cannot be seriously considered in arriving at the fair and reasonable value of one-half of the reservation in 1891 for the reason, first, that the Indians were uninformed as to the value of the land they were ceding and the representative of the Government who negotiated the purchase made no protense at offering the Indians an amount equal to the value of their title at that time; and, second, the Indian title at that time consisted merely of the right to use and occupy the lands and they did not have the beneficial right to all net proceeds derived from the sales of timber and other products of the reservation, as was the case in 1891. Upon the whole record we are of opinion that the value of $2,050,597.50 for a one-half interest in the reservation as it existed in August 1891 is fair and reasonable and fully justified by the facts.

5. The next question relates to the compensation to which the plaintiff is entitled by reason of the use and occupancy of the reservation by the Arapahoes equally with the Shoshones for the period 1878 to 1891. During this period the Arapahoes were maintained on the reservation by the Government without the consent of the plaintiff tribe, during which time no action had been taken by the Government which gave the Arapahoes any rights to or upon the reservation. This was in violation of art. 2 of the Shoshone

treaty of 1868. During this period of time the Government profited by having the Arapahoes settled upon the Shoshone Reservation. For many years prior to that time the Government had never been able to keep the Arapahoes upon any defined reservation and they had been causing the Government considerable difficulty. After they were placed upon the Shoshone reservation in 1878 they used the same equally with the Shoshones by hunting, farming, pasturing their stock, building houses and fences, [fol. 91] and sharing in the facilities of the agency and the employees provided by the Government for the Shoshone Tribe.

Plaintiff contends that it should be allowed compensation in the amount of $2,038,879.80 for the use and occupancy by the Arapahoes of one-half of the reservation, or 1,171,770 acres, at the rate of 14½ cents an acre a year. We are of opinion that this claimed valuation for use and occupancy by the Arapahoes is excessive and that the better method of determining the value of such use and occupancy, which bears some direct relationship to the benefit to the Government by having the Arapahoes on the reservation, the benefits derived by the Arapahoes, and the damages sustained by the plaintiff tribe, is to arrive at an amount which will approximate the benefits derived by the Government and the Arapahoe Indians and compensate the plaintiff tribe for the uses made of the reservation by the Arapahoes during the period in question. We believe that an amount of twenty-five dollars a year for each Indian in the Arapahoe Tribe is fair and reasonable in the circumstances. During the period from 1878 to 1891 the average annual population of the Arapahoe Tribe was 1,023. On a basis of a value of twenty-five dollars a year for this number of Arapahoes over a period of thirteen years, the plaintiff is entitled to recover $332,475. This amount is therefore allowed plaintiff tribe as the value of the use and occupancy of an undivided one-half interest in its reservation by the Arapahoe Tribe from March 1878 to August 1891.

6. The next claim of plaintiff is for $540,000, alleged damages sustained by plaintiff tribe for trespass by livestock belonging to persons other than the Indians from 1873 to 1894, for which alleged damages plaintiff insists the United States is liable under art. 2 of the treaty which

set apart the designated reservation for the absolute and undisturbed use and occupancy of plaintiff tribe; and in which article the United States also agreed that no persons, except those therein designated and authorized so to do, should ever be permitted to pass over, settle upon, or reside in the territory designated in that article for the use of said Indians.

It is insisted by the plaintiff that during this period there were as many as 20,000 horses and cattle annually on the reservation belonging to outside parties, from which the Indians derived no benefit and which stock destroyed much of the grass and hay on the reservation, and, in some instances, damaged the crops of plaintiff tribe. The amount of two dollars a head a year for all stock as the damage sustained by the Indians, amounting to $200,000, is claimed by plaintiff from 1873 to 1877, and one-half, or $340,000, from 1878 to 1894.

The evidence shows that at different times during this period a very large number of horses and cattle came upon and grazed over a very large area of the reservation, for the most part north of the Wind River, but we cannot say from the evidence in the record that there were as many as twenty thousand head of horses and cattle grazing upon the reservation annually during the period mentioned, and, even if the United States was liable during that period to compensate the Indians because of this trespass, which we think it was not, as we shall hereinafter endeavor to show, a charge of two dollars a head a year for all stock appears [fol. 92] to us to be excessive in view of the fact that the grazing fees on the reservation, under the Department regulations in 1927, were only $2.25 a head a year for cattle and three dollars a head for horses.

A proper interpretation of art. 2 of the treaty we think compels the conclusion that the United States is not liable to respond to the Indians for this alleged damage. During a portion of this period the Indian title consisted only of the right to use and occupy the reservation and they were not, during that period, the legal or beneficial owners of the products of the reservation. The provision of the treaty relied upon was common to practically all of the Indian treaties, and we think it would be an unwarranted construction of the language used in the treaty to place upon the United States the legal obligation to respond in

damages if it should fail to keep these vast reservations free from trespassing stock. Stock grazing was one of the principal businesses engaged in by the white settlers in the western country during this period and as such stock grazed over large areas where there were no barriers, it must have been known and contemplated when the treaty of 1868 was written that stock of white settlers, some of whom were then residing within the limits of the reservation and owned stock, and the stock of many others residing near the boundary lines of the reservation, would find their way at times upon the reservation. In these circumstances we think the United States, at most, agreed only to use its best efforts to keep the reservation free from intrusion or trespass by the whites. At the time the treaty with the plaintiff tribe was made, the act of June 30, 1834, 4 Stat. 730, U. S. Code, sec. 179, title 25, was in force and provided that "Every person who drives or otherwise conveys any stock of horses, mules, or cattle, to range and feed on any land belonging to any Indian or Indian tribe, without the consent of such tribe, is liable to a penalty of $1 for each animal of such stock"; and further provided (sec. 180, U. S. C., tit. 25) a penalty of $1 for every person who made a settlement on any lands belonging, secured, or granted by treaty with United States to any Indian tribe. The said act of 1834, sec. 223, U. S. C., tit. 25, authorized the President to employ the military forces in the enforcement of the provisions of that act. Repeated efforts were made by the Government through Indians agents, with the use of military forces on instruction from the Secretary of the Interior, to keep trespassing stock off the reservation and by the latter official, in attempts to prosecute all persons responsible for trespass with only partial success until about 1894, when trespass by stock upon the reservation was under control.

For the foregoing reasons we are of the opinion that the United States is not liable under art. 2 of the treaty for failure to keep plaintiff's reservation free from trespass of stock, and that plaintiff is not entitled to judgment on this claim.

7. Plaintiff next claims $4,455,000 damages for loss and destruction of game. We shall not undertake to discuss the details of the involved method by which plaintiff arrives at the amount of this claim, which, for the most part, is

based upon estimates and percentages, for the reason that we are of opinion that the United States was under no obligation by treaty, or otherwise, to preserve the wild game and fur-bearing animals upon the reservation for [fol. 93] the exclusive use and disposition of the Shoshone Indians. The reasons given for the denial of the foregoing claim with reference to trespassing stock and white settlers apply to the claim for damages for loss and destruction of game. It would seem obvious that without express language obligating the United States to compensate the Indians for a loss of this character it was not intended or contemplated by either party to the treaty that the United States would undertake such an impossible task or respond in damages so conjectural and incapable of definite proof. The language of the treaty setting apart the reservation for the use and occupancy of plaintiff tribe was the usual language used in practically all of the Indian treaties, of which there were a great many prior to and at the time of the making of the Shoshone Treaty in 1868, and the knowledge of the conditions existing in the western country at the time of the various treaties were made compels the conclusion that the United States did not intend to take upon itself the obligation of preserving the game and fur-bearing animals that might have been upon the various reservations at the time the treaties were made for the sole and exclusive use of the Indians. The treaty in this case did not mention game or fur-bearing animals. They were not a part of the reservation as that term was used in the treaty and the Indians had no title to the game upon which they could base a claim for damages against the United States. Section 8 of the act of June 30, 1834, supra (sec. 216, U. S. C., tit. 25), provided that "Every person, other than an Indian, who, within the limits of any tribe with whom the United States has existing treaties, hunts, or traps, or takes and destroys any peltries or game, except for subsistence in the Indian country, shall forfeit all the traps, guns, and ammunition in his possession, used or procured to be used for that purpose, and all peltries so taken; and shall be liable in addition to a penalty of $500."

It seems clear to us that the United States assumed no greater obligation in the preservation of game on Indian reservations than to use its best efforts to enforce the law.

In the case of the Blackfeet, Blood, Piegan, and Gros

Ventre Nations or Tribes of Indians v. The United States, no. E-427, decided April 8, 1935, this court, in denying a similar claim, said "The proof adduced to sustain the damages claimed is based upon what the plaintiffs assert as the reasonable value of the hunting grounds to the plaintiffs, equal in amount to the value of the food, clothing, lodges for shelter, bedding, furs, and hides necessary for the support and maintenance of each of the tribes for that portion of the 99 years of which they allege they were deprived. From historical and official documents the average number of the various tribes interested is sought to be established and a stated sum of $100 per year per person is fixed as the reasonable value of food, etc., necessary to maintain them. The treaty contains no express stipulation that the Government will respond in damages for the diminution in quantity or the entire loss of food and shelter supplies at the time available on the hunting ground. * * * The limited privilege and license to exploit the territory for game and wild animals, while limited as to parties, was not, we think, intended to fix other obligations that the one to delimit an area of lands, vast in extent, over which the Indians mentioned might hunt without in- [fol. 94] terference from other and hostile tribes. Assuredly no article of the treaty may be cited wherein the Government obligated itself to maintain this enormous acreage of land as a game preserve for the Indians for 99 years. The right accorded was a permissive one and its continued existence was dependent upon numerous factors over which neither the Government nor the Indians could possibly have control. The Indians for many years had hunted over this area and conflicting claims were set up as to the right to do so; the treaty did no more than adjust the difference by an amicable agreement among the Indians that those mentioned in the treaty would assent to the common privilege set forth therein, without in any way or by any terms guaranteeing to the Indians a maintenance of the status quo for almost a century. We need not, however, discuss at length the arguments pro and con advanced in the briefs. The plaintiffs' contention is vulnerable in many aspects. The court under the law could not award a money judgment upon proof conjectural and uncertain as to facts. Human testimony is incapable of establishing with any degree of certainty that either the quantity or character of food and

shelter supplies at the time on the hunting ground area would have remained sufficient to supply the plaintiff's needs had not the white emigrants and the Indian traders gone upon the lands. * * * It would be impossible from the record to ascribe to the Government alone the responsibility for the disappearance of game and wild animals from the hunting ground. * * *."

Plaintiff is not entitled to judgment upon this item of the claim.

8. Plaintiff next claims that it should be compensated in the amount of $101,520 for the value of wood and hay requisitioned for use at the military post from 1869 to 1909, inclusive. Of this amount, $43,020 represents the value claimed for wood at the rate of fifty cents a cord and one dollar a ton for the hay over a period of forty years. The amount of $58,500 represents claimed interest.

The facts show that the military forces at the military post on the reservation did use a considerable quantity of wood and hay, but it is shown by the evidence that the Indians of the Shoshone Tribe who were authorized by the Interior Department to supply this wood and hay to the military post were, during a greater portion of the period, given contracts by the Indian agent on authority of the Secretary of the Interior to deliver such wood and hay to the military post. The Indians were paid by the military authorities for the wood and hay furnished, and even if the Indian tribe had been the beneficial owner of the wood and hay on the reservation, which we think they were not prior to 1883, no recovery can be had in the circumstances.

Plaintiff contends that the Shoshone Tribe, as such, was the one entitled to compensation, and that it is of no consequence that the individual Indians who furnished the wood and hay received payment therefor. We cannot agree with this contention. Plaintiff is not entitled to judgment upon this claim.

9. The next item relates to plaintiff's claim for $1,106,750, alleged value of gold removed from land within the boundaries of the reservation between 1868 and 1874, inclusive. Plaintiff's estimate of the value of the gold removed from land within the original reservation is, we think, somewhat speculative and exorbitant, but it is admitted by all that a large quantity of gold was mined and re-

[fol. 95] moved from land embraced within the original boundary lines of the reservation as fixed in the treaty of 1868. Gold produced from the Miners' Delight district was taken from two types of deposits—lodes and placers. Miners' Delight lode was mined to an average depth of 100 feet for a distance of 1,900 feet; the width of the vein varied from 1½ to 5 feet; carried values from wall to wall averaged $15 to $40 a ton; and all ore was treated in stamp mills. The placers were likewise productive of much valuable gold.

The evidence is undisputed that a large quantity of gold was removed from lands lying within the boundaries of the reservation. The Government admits that gold of the net value of approximately $350,000 was mined within the reservation. Upon a consideration of all the evidence contained in the record, we are of opinion that the maximum value of gold removed from mines located within the limits of the reservation did not exceed $500,000. However, we deem it unnecessary to discuss this matter in detail, for the reason that, in our opinion, the plaintiff cannot recover on this item. Prior to and at the time of the making of the treaty of 1868, gold had been discovered and was being mined in the district mentioned, and the boundaries of the reservation as fixed by the treaty included within the reservation a portion of this mining district; in fact, the most valuable mines in the district were afterwards found to be located upon the reservation. As a result of this a commissioner was appointed pursuant to the act of Congress of June 1, 1872, to negotiate with the plaintiff tribe for the relinquishment of that portion of the reservation which included the mines and all gold-bearing land. Accordingly, an agreement was entered into between plaintiff tribe and the United States on September 26, 1872, ratified December 15, 1874 (18 Stat. 291), in which the former ceded to the United States, without any reservations whatever, approximately 700,000 acres of land, which included all the territory embraced within the boundaries of the reservation in any way affected by the gold-mining operations. A consideration of $27,500, specified in this agreement, was appropriated and paid, with the exception of about $14. In these circumstances we are not authorized under the jurisdictional act to reopen this matter. Moreover, the Indian title at the time this cession was made consisted only of the

right to use and occupy the reservation, and at that time the Indians were not the legal or beneficial owners of the mineral rights.

10. The next item on which plaintiff seeks to recover amounts to $418,820.53, of which $245,980.98 represents the unexpended balance of the total appropriations of $1,375,665.34 made for the purpose of carrying out the provisions of the Shoshone Treaty of July 3, 1868, and $172,839.55 represents expenditures under arts. 7, 9, and 10, for transportation of supplies, fuel, and light, miscellaneous agency expenses, agency buildings and repairs, Indian police clothing, pay of interpreters, and one-half of the expenditures made for education and treaty employees from the time the Arapahoes arrived on the reservation in 1878 to June 30, 1927, inclusive.

We are of opinion that the plaintiff is not entitled to recover on this item of the claim. Under the treaty of 1868 the United States did not agree to pay the plaintiff tribe any amount in money in respect of the matters of which the plaintiff complains, and the fact that it appropriated [fol. 96] more money for the purpose of carrying out the provisions of the treaty of 1868 than was found necessary to be disbursed for the articles, and facilities and employees agreed to be furnished in the treaty does not entitle the plaintiff to recover any portion of the unexpended balance appropriated for these various purposes unless it is shown that there was a failure on the part of the United States to furnish the provisions, facilities, or employees specified in the treaty. Even in the latter event it would be necessary for plaintiff to show wherein the United States had failed to fulfill its obligation under the treaty and the extent of such failure. This has not been done. The plaintiff, in its brief, makes some reference to the fact that the United States did not fully comply with art. 7 of the treaty by making sufficient appropriations to provide a school building and a teacher for every thirty children, between the ages of 6 and 16 years, for twenty years. There is some evidence in the record that a school and a teacher were not provided for every thirty children in the Shoshone Tribe between the ages mentioned for the period specified, but the plaintiff makes no definite claim in this regard and the evidence does not establish that the schools and teachers furnished by the Government were not adequate to take care

of the number of children between the ages specified who could be induced to attend school.

The Congress in the various appropriation acts from year to year appropriated specific amounts for specified purposes in the fulfillment of its obligations under the treaty, and the amounts making up the total returned to the Treasury by surplus warrants represented the portion of the amounts specifically appropriated which were found not to be needed for the purposes for which they were appropriated. It has not been shown that the United States did not furnish suitable agency buildings under art. 3; schools and teachers under art. 7; seeds and implements, and a second blacksmith sufficient for the needs of those Indians who engaged in farming under art. 8; annuity goods, clothing, provisions, etc., under art. 9; and sufficient skilled employees for the needs of the Indians under art. 10.

Typical cases illustrating the reason for the return to the Treasury of a portion of the total appropriations for fulfilling the treaty may be cited in connection with the appropriations under art. 9 for annuity goods, clothing, provisions, etc., and for payments to Indians roaming and farming. In respect to the former, the total disbursements for supplying annuity goods, clothing, provisions etc., were $254,657.54, leaving $30,015.26 specifically appropriated for this purpose which was returned to the Treasury by surplus warrant. In respect of the latter, Congress specifically appropriated a total of $265,000 to provide for payments to Indians roaming and farming, and only $237,501.06 was found necessary to be expended for this purpose, leaving a balance of $29,903.68 of such appropriation which was returned to the Treasury by surplus warrant.

What has been said above with reference to plaintiff's right to recover the unexpended balance of the appropriations made to carry out the provisions of the treaty applies to the amounts sought to be recovered with respect to disbursements for transportation of supplies, fuel and light, [fol. 97] etc., which were disbursed and charged to the account "Fulfilling Treaty with the Shoshones." Plaintiff claims that disbursements for the purposes mentioned above represented Government expenditures, which were not proper charges against the Indian tribe. No offsets or counterclaims are made, or could be made, in respect of any disbursements in fulfilling the obligation of the United

States under its treaty with the plaintiff tribe, and we fail to see wherein the tribe has any legal or equitable claim for the recovery from the Government of any amount expended by it in providing and maintaining the facilities and employees agreed to be furnished under the treaty. Even if the amount expended for the purposes mentioned in maintaining the agency buildings, Indian police, and for transportation of supplies be treated as Government expenditures and deducted from the total expenditure disbursed in fulfilling the treaty of 1868, we fail to find in the treaty any provision that would entitle the plaintiff to a judgment for the amounts so expended. Interpreters were employed to enable the Government and the plaintiff tribe property to carry on their negotiations and dealings with each other. The amounts disbursed for that purpose fall in the same class as the disbursements previously mentioned. Nor do we think that plaintiff tribe is entitled to recover one-half of the total disbursements made for educational purposes and for skilled employees under art. 10 in the total amount of $261,313.36 after the Arapahoe Indians came upon the reservation in 1878 to June 30, 1927, for the reason that the evidence does not establish that the plaintiff tribe failed to receive the services of the employees specified according to their needs. Appropriations for skilled employees were made by Congress from year to year for the Arapahoe Tribe of Indians after they moved to the Shoshone Reservation, and there is some evidence in the record that the number of employees at the agency was increased after the arrival of the Arapahoe Indians.

On the whole, we are of opinion that plaintiff is not entitled to recover any amount in respect of the unexpended balance of the total treaty appropriations returned to the Treasury by surplus warrants nor in respect of the treaty expenditures made for various purposes after the arrival of the Arapahoe Indians.

11. The next item relates to the cession agreement of September 26, 1872, supra, (finding 21), under which the United States agreed to purchase and deliver on or before August 10 of each year cattle in the amount of $5,000 annually for five years, and, further, to pay $500 per annum as salary for a like period to Washakie, chief of the Shoshone Tribe of Indians. The amount of $27,485.50 was paid to or expended for the benefit of plaintiff tribe and the balance

of $14.50 of the total consideration appropriated by Congress for fulfilling the provisions of this agreement was returned to the Treasury by surplus warrant. Plaintiff is entitled to recover the latter amount.

12. The next item relates to the Big Horn Hot Springs Cession Agreement of April 21, 1896, 30 Stat. 93, in which 55,040 acres were ceded to the United States for a total consideration of $60,000. The total consideration mentioned was appropriated and disbursed as shown in finding 22. Under our decision that an undivided one-half interest in the Shoshone or Wind River Reservation was taken for [fol. 98] the benefit of the Northern Arapahoe Indians on August 13, 1891, the plaintiff tribe and the Arapahoe Tribe of Indians were each, entitled to one-half of the consideration agreed to be paid under this agreement. The Arapahoe Tribe of Indians have been paid or credited with $7,661.84 in excess of the amount to which they were entitled under this agreement, and plaintiff is entitled to judgment for this amount.

13. The next item relates to the agreement of April 21, 1904, 33 Stat. 1016 (finding 23), under which the plaintiff tribe and the Arapahoe Tribe were likewise each entitled to one-half the proceeds derived thereunder, and each tribe was chargeable with one-half of the disbursements made out of the funds so derived. On this basis the plaintiff tribe is entitled to recover $3,014.98, for which judgment will be entered.

14. The next item relates to the net income of $1,628,744.56 derived from the Wind River Reservation under the act of March 3, 1883, 22 Stat. 590; the act of March 2, 1887, 24 Stat. 449; and the act of May 18, 1916, 39 Stat. 123, from which certain expenditures were made, as set forth in finding 24, leaving a balance of $111,937.62 on hand. Inasmuch as each tribe owned an equal interest in the reservation, they were each entitled to be credited with one-half of this income, which was chargeable against the respective tribes as and when expended. On this basis plaintiff was entitled on June 30, 1927, the date on which the accounting ended, to $89,704.17. This amount will be included by the court in the sum found to be due the plaintiff herein.

15. The last item of plaintiff's claim relates to interest. It claims interest at the rate of 7 percent per annum, the

legal rate in Wyoming, which interest claim applies to the value of the interest in the Reservation which was taken for the Arapahoes and to the value of the use and occupancy by the Arapahoes from 1878 to 1891, as well as to the amount allowed under the agreement of 1896 representing the amount to which plaintiff was entitled, but which was diverted to the use of the Arapahoes.

The jurisdictional act under which this suit was brought makes no mention of interest, except in sec. 2 thereof where it is provided that all amounts which may be found due and recoverable by said tribe, less attorneys' fees and expenses, shall be deposited in the Treasury of the United States to the credit of said tribe and shall draw interest at the rate of 4 percent per annum from the date of the judgment or decree. The provisions of sec. 1 of the act simply confer jurisdiction on this court to hear, examine, adjudicate, and render judgment in any and all legal and equitable claims of plaintiff tribe, and the provisions of sec. 3 that "the decree of the court shall be in full settlement of all damages, if any, committed by the Government of the United States and shall annul and cancel all claim, right, and title of the said Shoshone Indians in and to such money, lands, or other property" do not, we think, authorize this court to allow interest upon any item of the claim in view of other provisions of the law that no interest shall be allowable on any claim against the United States unless specifically authorized by statute or by contract. Section 177 of the Judicial Code denying the allowance of interest in suits against the United States is of such long standing that it [fol. 99] must be presumed that had Congress intended in the jurisdictional act, under which this suit was brought, that interest be recoverable on any of the items of the claim it would have so provided. In the case of United States v. Omaha Tribe of Indians, 253 U. S. 275, the court upon a claim for interest on an amount recovered under a cession agreement by the Omaha Indians said: "It is contended, however, both as to the award for the excess land and as to another claim allowed, that as the jurisdictional act calls for the consideration of equitable as well as legal claims, the ordinary rule of equity ought to be followed as to the allowance of interest (Himely v. Rose, 5 Cranch, 313, 319, being cited). But the jurisdictional act cannot be regarded as taking the case out of the usual rule. Tillson v.

United States, 100 U. S. 43, 46; Harvey v. United States, 113 U. S. 243, 249 * * *.'' In Tillson v. United States, supra, the court said with respect to a claim for interest under the jurisdictional act, in all material respects the same as the act now before the court, that ''We have no doubt it was the wish of those who procured the passage of the special statute under which the Court of Claims took jurisdiction of this suit to obtain from Congress authority for that court to give a judgment against the United States at least for interest, in case it should be found that payments on the contracts held by the claimants had been unreasonably delayed. But if Congress had desired to grant such authority, it would have been easy to have said so in express terms; and because it did not say so, we are led irresistibly to the conclusion that it did not intend to give any such power. By the statute, the court was required to investigate the claim, and 'ascertain, determine, and adjudge the amount equitably due such firm, if any, for such loss or damage.' There is nowhere any intimation that the investigation is to be conducted otherwise than judicially. The reference was made to the court as a court, and not to the judges as arbitrators. The determination is to be made according to the fixed rules which govern that court in the adjudication of causes, and not at the discretion of the judges. The same principles of jurisprudence and the same statutory regulations as to practice are to be applied here that would be if the case had come into the court under its general jurisdiction. It is to be ascertained and determined what, if anything, is due the claimants from the Government, according to the rules of law applicable to the settlement in that court of controversies between the Government and its citizens. The special statute does not even provide that the adjustment shall be made upon principles applicable to suits between citizens. To our minds the word 'equitable', as here used, means no more than that the rules of law applicable to the case shall be construed liberally in favor of the claimants. * * * Interest, however, would have been recoverable as against a citizen, if the payments were unreasonably delayed. But with the Government the rule is different, for in addition to the practice which has long prevailed in the departments of not allowing interest on claims presented, except it is in some way specially pro-

vided for, the statute under which the Court of Claims is organized expressly declares 'that no interest shall be allowed on any claim up to the time of the rendition of judgment thereon in the Court of Claims, unless upon a contract expressly stipulating for interest.' Rev. Stat., [fol. 100] sect. 1091. This is conclusive." See, also, Ely v. The United States, 19 C. Cls. 658, in which this court held that interest as damages is controlled by the Revised Statutes, sec. 1091 (sec. 177, Judicial Code), though the action be authorized by a special act; and Citizen Indians of the Weas et al. v. The United States, 26 C. Cls. 323, in which the court held that interest in the nature of damages could not be recovered from the United States. Under these authorities plaintiff's claim for interest must be denied.

The amounts which we have concluded the plaintiff tribe is entitled to recover in respect of the various items of the claim total $2,483,467.99.

16. The next feature of the case relates to the offsets claimed by the defendant under the special jurisdictional act consisting of gratuity disbursements under other than treaty appropriations and under specific appropriations. The defendant claims offsets in the total amount of $2,483,467.99. The facts and circumstances relating to these disbursements have been set forth in detail in Findings 25 to 34, inclusive, and will not be repeated here. The total of the offsets set up by the Government in its brief, as above mentioned, have been reduced to $1,689,646.50 as a result of the allocation by the court of a portion of the direct charges made against the plaintiff tribe to joint expenditures for the benefit of both tribes for the reason that the record does not disclose any direct charges against the Arapahoe Tribe in those instances. It would obviously be unfair to offset against the plaintiff tribe expenditures made for purposes in the benefits of which both tribes shared equally, even though such expenditures were charged on the books of the Government directly against the plaintiff tribe. This accounts for a portion of the reduction in the claimed offsets. The balance of the reduction consists of the elimination of two items of $235,963.70 disbursed during the period 1913 to 1927 for roads and bridges on the Shoshone Reservation and $2,264,123 representing disbursements for irrigation systems on the

same reservation during the period 1906 to 1927. We think it is clear that these items are not at this time proper offsets against the plaintiff tribe, as such, in view of the facts disclosed in the findings and the provisions of the acts of Congress quoted therein. The act of July 1, 1932, 47 Stat. 564, provided for the elimination of outstanding reimbursable charges for roads and bridges and the balance outstanding on December 15, 1932, in the amount of $131,492.50, was eliminated and no longer constitutes a reimbursable charge against the Indian tribe as such. The same is true with reference to the expenditures for irrigation, which, by law, has become a charge against the individual Indians to whom land has been allotted and constitutes a first lien on such land. An area of 245,058 acres on the diminished reservation had been allotted in severalty during the period 1907 to 1919.

Plaintiff claims that all expenditures for roads and bridges should be excluded from the offsets, but it seems clear that the act of 1932 authorized elimination only of amounts expended for roads and bridges which the appropriation acts made reimbursable by the tribe. All other expenditures for this purpose, which totaled $266,105.38, remained in the same class as other gratuity disbursements.

Plaintiff contends that the expenditures for pay of agents and interpreters, transportation of supplies, ex- [fol. 101] penses of delegations, and for presents, made out of gratuity appropriations, are not proper offsets chargeable against the tribe, for the reason that the amounts paid out for such purposes were strictly governmental expenditures and that the jurisdictional act did not contemplate that the plaintiff tribe should be charged therewith. With this contention we cannot agree. A similar claim was denied by this court in the case of Blackfeet, Blood, Piegan, and Gros Ventre Tribes of Indians v. U. S., supra, in connection with which the court said:

"Expenditures for the payment of agents, Indian police, judges, interpreters, miscellaneous employees, agency buildings and repairs, superintendents and teachers, surveying, and other like items. It is contended by plaintiffs that these disbursements were made for the general administrative expenses of the Indian Service of the United States, and that the record does not show that the plain-

tiffs, as tribes, received any benefit from such expenditures, or, even if it be assumed they did, to what extent.

"It is difficult to conceive any theory under which these expenditures did not inure directly to the benefit of the plaintiff tribes. They were expenditures which the United States was under no legal obligation to make for, or in behalf of, the plaintiffs. They were unqualified gratuities, and, as such, under the plain provisions of the jurisdictional act, are properly chargeable against the plaintiffs as set-offs against the amounts they are entitled to recover."

The total of the offsets to which the defendant is entitled against the plaintiff tribe is $1,689,646.50. The deduction of this amount from the total of $2,483,467.99, which we hold the plaintiff is entitled to recover, leaves a balance of $793,821.49 for which judgment will be entered in favor of plaintiff. It is so ordered.

Whaley, Judge; Williams, Judge; Green, Judge; and Booth, Chief Justice, concur.

[fol. 102] VI. JUDGMENT

At a Court of Claims held in the City of Washington on the 2nd day of December, A. D. 1935, judgment was ordered to be entered as follows:

Upon the special findings of fact, which are made a part of the judgment herein, the court decides as a conclusion of law that the plaintiff is entitled to recover $2,483,467.99.

The defendant on its counterclaim is entitled to offset against the claim of the plaintiff the amount of $1,689,646.50, leaving a balance of $793,821.49.

It is therefore adjudged and ordered that the plaintiff recover of and from the United States seven hundred ninety-three thousand eight hundred twenty-one dollars and forty-nine cents ($793,821.49).

VII. PROCEEDINGS AFTER ENTRY OF JUDGMENT

On January 18, 1936, the defendant filed a motion for extension of time of 15 days within which to file motion for

new trial, or for permission to file motion for new trial in typewritten form.

On January 21, 1936, the court allowed the defendant 15 days within which to file printed motion for new trial.

On January 31, 1936, the plaintiff filed a motion for extension of time of 15 days within which to file motion for new trial.

Said motion was allowed by the court January 31, 1936.

On February 14, 1936, the defendant filed a motion for a new trial.

On February 14, 1936, the plaintiff filed a motion for a new trial.

On June 1, 1936, the following memorandum and order overruling motions of plaintiff and defendant for new trial and amendment of findings was handed down by the court with an opinion Per Curiam:

[fol. 103] VIII. MEMORANDUM AND ORDER OVERRULING MOTIONS OF PLAINTIFF AND DEFENDANT FOR A NEW TRIAL AND AMENDMENT OF FINDINGS—Filed June 1, 1936

Per CURIAM:

Motions for a new trial have been filed by both parties. Plaintiff's motion for a new trial is based upon the ground that the court erred in holding (1) that an interest in the Shoshone Reservation was taken for the benefit of the Arapahoes in 1891 rather than in March 1927 when the Jurisdictional Act was passed; (2) in allowing inadequate compensation for the value of the land taken on the theory that the taking occurred in 1891, and (3) in refusing to allow interest at a reasonable rate as part of compensation for the property taken and not paid for.

The defendant's motion for a new trial, except for two items of additional offsets for alleged gratuity disbursements made subsequent to June 30, 1927, is based wholly upon a reargument of the original issues and facts presented in the case and fully considered and discussed by the court in its opinion heretofore rendered.

We have carefully studied these motions for a new trial and the briefs in support thereof, and the additional photostatic copy of documents submitted by the defendant as newly discovered evidence. The entire record has been [fol. 104] again carefully studied, and considered in the

light of the contentions and arguments made in the motions for a new trial and nothing has been found that convinces the court that the findings heretofore made or the conclusions set forth in the original opinion should in anywise be changed or modified. And the court is also satisfied that there is no basis for the granting of a new trial under Section 175 of the Judicial Code on the ground that a wrong or injustice has been done to the United States by reason of the rendition of the judgment in favor of plaintiff herein. If, under all of the facts and circumstances as disclosed by the record and the history of this case from 1878, when the Arapahoes were brought to and placed upon the Shoshone Reservation over the objection of plaintiff, any wrong or injustice has been done in the disposition that the court has made of the matter, it was against the plaintiff in the conclusion that the Shoshone property was actually and legally taken in 1891 instead of 1927, in the value given to the Shoshones for the property taken from them, and in not allowing interest as a part of the measure of compensation. But the court labored upon the case and the authorities upon the subject and carefully studied and considered the record for many months, in the light of all of the statutes enacted by Congress, and the dealings between the plaintiff tribe and the Government, and it is satisfied that the conclusions reached and the judgment rendered in the original opinion are sustained by the record and are fair and reasonable under all of the circumstances in view of the relationship existing between the Indians and the Government. If the court had been dealing with similar questions between private parties or between the Government and a citizen, conclusions more favorable to the plaintiff as to the date of taking and the matter of interest probably would have been compelled by the facts and circumstances. On the whole, therefore, the court is of opinion that there is no merit in either motion for a new trial and that they should be overruled.

[fol. 105] The defendant has submitted a supplemental report from the General Accounting Office with reference to disbursements charged to the plaintiff tribe, and to the plaintiff and the Arapahoe Tribe jointly, for the period July 1, 1927, to June 30, 1934, the previous accounting report submitted to and considered by the court covering only the period from 1868 to June 30, 1927. This supplemental accounting report shows disbursements totalling $6,904.48

charged directly to the plaintiff tribe and $742,404.66 charged jointly against plaintiff and the Arapahoe Tribe. Of the latter amount $255,028.30 represented the amount disbursed for irrigation, which, under the court's opinion, is not a proper item of offset. This leaves a balance of $487,376.36, which the defendant insists the court should prorate to the two tribes on the basis of population and deduct from the judgment rendered herein in favor of plaintiff and that a new trial should be granted and the judgment heretofore entered should be vacated for this purpose. The court finds no reason for granting a new trial and reopening the case in respect of these disbursements. They can be handled by the Interior Department and the accounting officers of the Government under and in accordance with the very definite rules laid down by the court in the opinion heretofore published, and the accounts of the two tribes with the Government for the period July 1, 1927, to June 30, 1934, and subsequently, can be adjusted accordingly. The Jurisdictional Act under which this case was decided contemplated that the court should decide the principles involved and announce the rules to be followed in the matter of accounting between the Government and the two tribes with reference to the property and moneys of the Shoshone Indians taken for the benefit of the Arapahoe Tribe, and that any matters of accounting to the two tribes for funds subsequently arising should be carried out in accordance with the opinion of the court. If this were not true it would be necessary for the court to keep the case continually open for consideration of future disbursements.

[fol. 106] The motions for a new trial and amendment of the findings are overruled, and it is so ordered.

[fol. 107] Clerk's certificate to foregoing transcript omitted in printing.

Endorsed on cover: File No. 40,756. Court of Claims. Term No. 216. Shoshone Tribe of Indians of the Wind River Reservation in Wyoming, petitioner, vs. The United States. Petition for a writ of certiorari and exhibit thereto. Filed July 22, 1936. Term No. 216, O. T. 1936.

[fol. 108] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1936

No. 216

ORDER ALLOWING CERTIORARI—Filed October 19, 1936

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 109] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1936

No. 328

ORDER ALLOWING CERTIORARI—Filed October 19, 1936

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Office - Supreme Court, U. S.
FILED
JUL 22 1936
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 216

SHOSHONE TRIBE OF INDIANS OF THE WIND RIVER RESERVATION IN WYOMING,
Petitioner,

vs.

THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS AND SUPPORTING BRIEF.

GEORGE M. TUNISON,
Counsel for Petitioner.

CHARLES J. KAPPLER,
ALBERT W. JEFFERIS,
FRANCIS S. HOWELL,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 216

SHOSHONE TRIBE OF INDIANS OF THE WIND RIVER RESERVATION IN WYOMING,

Petitioner,

vs.

THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

Petitioner, Shoshone Tribe of Indians of the Wind River Reservation in Wyoming, prays that a writ of certiorari issue to review the judgment of the Court of Claims in this case rendered December 2, 1935.

The Shoshone Tribe of Indians have ever been friendly to the citizens and loyal to the Government of the United States (Finding 4, R. 36). They have been deprived of the use of, and finally of the title to, an undivided half of their Treaty Reservation, the fairest portion of Wyoming, unlawfully and without compensation. The findings and opinion of the Court of Claims recognize and establish the

wrong done the Shoshones. But it is believed that the legal conclusions drawn by the Court from the facts found have resulted in an entirely inadequate award of compensation.

Statement of Matter Involved.

Prior to 1868 the Shoshone Tribe held under Treaty (18 Stat. 685, 2 Kappler, 848,) 44,672,000 acres of land in Colorado, Utah, Idaho and Wyoming. Their title was not disputed (Finding 1, R. 31).

Upon the close of the Civil War the transcontinental railroads, authorized by act of Congress, were in course of construction from the Missouri River westward to the Pacific. They were obliged to cross vast tracts in possession of Indian tribes, one of such tracts being the above-mentioned Shoshone Treaty lands. To meet this situation Congress enacted the Indian Peace Commission Act of July 20, 1867 (15 Stat. 17). It was necessary under the land-grant to the Union Pacific Railroad to clear title to a strip of land through the heart of the Shoshone domain 40 miles wide and over 400 miles long. The Peace Commission met with the Shoshones at Fort Bridger. By the Treaty of July 3, 1868, (15 Stat. 673, 2 Kappler, 1020), upon which this suit is based, the Shoshones relinquished the vast domain theretofore held by them and accepted in lieu thereof the reservation involved in this cause. This reservation contained originally 3,054,182 acres and comprises the fairest and best watered portion of the State of Wyoming (Finding 5, R. 38). The Treaty contains the following provisions (Finding 2, p. 33, 36):

> "ARTICLE 2. * * * The United States further agrees that the following districts of country, to-wit: * * * (describing boundaries) * * * shall be and the same is set apart for the absolute and undisturbed use and occupation of the Shoshone Indians herein

named, and for such other friendly tribes or individual Indians as from time to time they may be willing, with consent of the United States, to admit amongst them; and the United States now solemly agrees that no persons except those herein designated and authorized so to do, and except such officers, agents, and employes of the Government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the territory described in this article for the use of said Indians, and henceforth they will and do hereby relinquish all title, claims, or rights in and to any portion of the territory of the United States except such as is embraced within the limits aforesaid."

(NOTE.—This language did not include the Arapahoe Indians.)

"ARTICLE 11. No treaty for the cession of any portion of the reservations herein described which may be held in common shall be of any force or validity as against the said Indians, unless executed and signed by at least a majority of all the adult male Indians occupying or interested in the same; * * *

Provisions substantially identical with the foregoing appear in all of the great treaties made by the Indian Peace Commission (Opin., R. 70).

The Shoshone Tribe promptly thereafter located upon this reservation and has ever since remained thereon and kept and observed all of the provisions of said treaty (Finding 6, R. 40).

In the Winter of 1877-1878, the Northern Arapahoe band of Indians, which had been at war with the Government of the United States, was brought from western Nebraska, under military escort, to and upon the Shoshone Reservation under the promise of the Indian Office officials that they would be removed therefrom the following year and

located upon a reservation of their own at a place in Wyoming called Red Buttes near the mouth of the Sweetwater River (Finding 10, R. 43). They were never removed (Finding 10, R. 50). The Shoshones, from time to time, protested vigorously and appropriately against the presence of the intruders on their reservation and demanded their removal (Finding 10, R. 50). Their protests were ignored by officials of the Indian Office, and on August 13, 1891, the Commissioner of Indian Affairs, in writing, advised that (Finding 11, R. 50):

> "This office holds * * * that the Arapahoes have equal rights to the land on said reservation which does not depend upon the further consent of the Shoshones, * * *"

The above was the only action ever taken by anyone representing the United States with reference to the permanent settlement and location of the Northern Arapahoe band of Indians upon the Shoshone Reservation (Finding 11, R. 50). Thereafter the Shoshones continued their protests against the presence of the Arapahoes on the reservation and have continued to protest down to the present date (Finding 10, R. 45, 48, 49, 50; Finding 11, R. 50; Findings 14-15, R. 53; Opin., R. 73).

The Jurisdictional Act of March 3, 1927 (44 Stat. 1349), printed in full in the Amended Petition (R. 1-3), conferred jurisdiction upon the Court of Claims, with right of appeal to the Supreme Court of the United States, notwithstanding lapse of time or statutes of limitation, to hear, examine, adjudicate, and render judgment in any and all legal and equitable claims which the Shoshone Tribe may have against the United States arising under or growing out of the Treaty of July 3, 1868. The Act further provided:

> "In reference to all claims which may be the subject-matter of the suits herein authorized, the decree of

> the court shall be in full settlement of all damages, if any, committed by the Government of the United States and shall annul and cancel all claim, right, and title of the said Shoshone Indians in and to such money, lands or other property."

This is the only act ever passed by Congress pertaining to taking of title to the lands in suit (Finding 11, R. 51).

Pursuant to this Statute the Shoshones brought the present suit to recover just compensation for the taking of the temporary use and occupancy of an undivided half of their reservation by the United States for the use of the Arapahoes, and to recover just compensation for the permanent taking of the title to an undivided half interest in said reservation by the United States for the benefit of itself and the Arapahoe Tribe.

The Court of Claims held that the matter of permanent location of the Arapahoes upon the Shoshone Reservation had never been presented to the Shoshones (Finding 10, R. 48); that the Shoshones had never consented to the permanent location of the Arapahoes upon the Shoshone Reservation (Finding 10, R. 45); that there had been a use and a taking of an undivided half interest in the Shoshone's Reservation by the United States and that the permanent taking was effectuated by the 1891 letter of the Commissioner of Indian Affairs (Finding 11, R. 50; Opin., R. 78). The Court allowed the Shoshones at the rate of $1.75 per acre for an undivided half interest in the 2,343,540 acres comprising the reservation in 1891, amounting to $2,050,597.50 (Finding 16, R. 53; Opin., 78-79). The Court also allowed for the use and occupancy of said undivided half from 1878 to 1891, by approximately 1000 Arapahoe Indians, at the rate of $25.00 per Indian per year, amounting to $332,475 (Finding 16, R. 53); Opin,, R. 82). The Court made other minor allowances, making the

total which it found the plaintiff entitled to recover, $2,483,467.99 (R. 68).

Against the above recovery the Court awarded the United States on its counterclaim for gratuities, $1,689,646.50 (R. 68).

The Court adjudged that the plaintiff recover from the United States the difference between the above amounts, viz., $793,821.49 (R. 68).

Reasons Relied Upon for Allowance of the Writ.

1. The Court of Claims erred in its holding that the letter of the Commissioner of Indian Affairs of August 13, 1891, constituted a permanent taking of an undivided half interest in the Shoshone's Treaty Reservation. Petitioner contends that an interest in the Shoshone's Reservation could be acquired only:

> 1. In the manner provided by Article 11 of the Treaty, viz., by signature of a majority of the adult males; or
>
> 2. As provided in Section 2116, R. S.

2. The compensation allowed by the Court of Claims for temporary use and occupation of an undivided half interest in the Shoshone Treaty Reservation from 1878 until the permanent taking of said undivided half interest, viz., $25,000 per year is, as a matter of law, inadequate. The Court found the value of the undivided half interest in 1891 to be a little over $2,050,000. A return of 4% per annum on this amount would be $82,000 per year, which is the minimum to which, in view of the Court's findings as to the desirability of the Shoshone Reservation as a place for the Government to keep the Arapahoes, the Shoshones should be entitled. The Court of Claims allowed nothing by way of addition to the value of the use taken, at the time

of taking, to produce the present full equivalent of that value paid contemporaneously. Just compensation is not rendered by paying, many years after the taking, merely the value of the property at the time of taking.

3. The Jurisdictional Act provides that the judgment shall extinguish the title of the Shoshones to the property taken. This is the first and only declaration by Congress, or by any one authorized to represent the United States, of an intent to take permanently an interest in the Shoshone's Reservation. Plaintiff contends that the taking of the title to an undivided half interest in their Treaty Reservation occurred upon the passage of the Jurisdictional Act of 1927 and the bringing of this suit thereunder and that the value should be fixed as of 1927, together with interest thereon from that date as a part of just compensation.

4. However, should this Court conclude that the permanent taking of the undivided half of the reservation was accomplished by the Commissioner's letter of 1891, then, and in that event, there should be added to the value so found such sum as will produce the present full equivalent of that value paid contemporaneously. Interest at a reasonable rate is a proper and convenient method of ascertaining the amount to be added.

The Order of the Court of Claims of June 1, 1936, overruling the motions for new trial, both of petitioner and of the United States, states (R. 99):

> "If, under all of the facts and circumstances as disclosed by the record and the history of this case from 1878, when the Arapahoes were brought to and placed upon the Shoshone Reservation over the objection of plaintiff, any wrong or injustice has been done in the disposition that the court has made of the matter, it was against the plaintiff in the conclusion that the Shoshone property was actually and legally taken in 1891

instead of 1927, in the value given to the Shoshones for the property taken from them, and in not allowing interest as a part of the measure of compensation. * * *

"If the court had been dealing with similar questions between private parties or between the Government and a citizen, conclusions more favorable to the plaintiff as to the date of taking and the matter of interest probably would have been compelled by the facts and circumstances."

Petitioner submits that the court below has decided an important question of law in conflict with the weight of authority. The questions presented are of substance relating to the application of the Constitution to a treaty of the United States.

The Jurisdictional Act provides:

"With right of appeal to the Supreme Court of the United States by either party, * * *"

While under the decisions of this Court since the Act of February 13, 1925, relating to review of decisions of the Court of Claims the above quoted language of the Jurisdictional Act is not relied upon as granting the absolute right of review, yet it is believed that the language indicates the importance which Congress attached to the case and the intent that same should be ultimately passed upon by this tribunal.

WHEREFORE your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Court of Claims, commanding that Court to certify and to send to this Court for its review and determination, a full and complete transcript of the record and proceedings in the case numbered and entitled on its docket, No. H-219, Shoshone Tribe of Indians of the Wind River Reservation in Wyoming,

plaintiff, *vs.* The United States of America, defendant, and that the said judgment of the Court of Claims may be reversed by this Court with appropriate directions, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem proper; and your petitioner will ever pray.

SHOSHONE TRIBE OF INDIANS OF THE
WIND RIVER RESERVATION IN WYOMING,
By GEORGE M. TUNISON,
Counsel for Petitioner.

CHARLES J. KAPPLER,
ALBERT W. JEFFERIS,
FRANCIS S. HOWELL,
Of Counsel.

BRIEF IN SUPPORT OF THE PETITION.

Opinion Below.

The opinion of the Court of Claims together with its special findings of fact and conclusion of law are in the printed record beginning at page 30. The opinion is not yet reported.

Jurisdiction.

The jurisdiction of the Court is invoked under Section 3 (b) of the Act of February 13, 1925; Title 28, Section 288, Subsection (b) U. S. Code Annotated.

Jurisdiction is also invoked under the provisions of the Jurisdictional Act under which this suit was brought, printed in full in the Amended Petition (R. 1-3), which Act provides:

> "That jurisdiction be, and is hereby, conferred upon the Court of Claims, with right of appeal to the Supreme Court of the United States by either party, * * *."

The case was decided December 2, 1935 (R. 30). Motions for new trial were overruled in a Memorandum and Order June 1, 1936 (R. 98).

Statement of the Case.

The case is stated in the Petition. *Ante.*

Specification of Errors.

I.

The Court erred in holding as a matter of law, in substance and effect, that an undivided half interest in the Shoshone's Treaty Reservation was permanently taken

from the Shoshone Tribe by the United States on August 13, 1891, by virtue of the letter and holding of the Commissioner of Indian Affairs of said date, in which the Commissioner stated (Finding 11, R. 50; Opin., R. 78):

> "This office holds • • • that the Arapahoes have equal rights to the land on said Reservation which does not depend upon the further consent of the Shoshones, and you should conduct your negotiations with them upon that basis and with that understanding."

Authorities.

Article 11 Shoshone Treaty, July 3, 1868, 15 Stat. 673;
Revised Statutes U. S. Sec. 2116; 25 U. S. C. A. Sec. 177;
Lane, Secretary of Interior v. *Pueblo of Santa Rosa,* 249 U. S. 110, 113;
Borax Consolidated v. *Los Angeles,* 296 U. S. 10;
Leecy v. *United States,* C. C. A., 8th Circuit, 190 Fed. 289. Appeal dismissed, 232 U. S. 731;
United States v. *Creek Nation,* 295 U. S. 103;
Pueblo of Santa Rosa v. *Fall,* 273 U. S. 315, 320-1;
18 *Opinions Attorney General,* 235;
United States v. *Carpenter,* 111 U. S. 347;
Leavenworth, et al. R. R. Co. v. *United States,* 92 U. S. 733.

II.

The Court erred as a matter of law in not holding that the permanent taking of the Arapahoe allotments and the undivided half interest in the tribal lands of the Shoshone's Reservation occurred in 1927 upon the passage of the Jurisdictional Act herein and the filing of this suit by the Shoshone Tribe under said Act.

Same authorities as Number I.

III.

The Court erred in holding, as a matter of law, that the statute, 25 U. S. Code Annotated, Indians, Sec. 2, charging the Commissioner of Indian Affairs with the duty to manage all Indian Affairs, conferred power on said Commissioner to hold that the Arapahoes had equal rights to the land of the Shoshone's Treaty Reservation (Opin., R. 76-78); the duty to manage not being equivalent to authority to alienate the corpus of the Shoshone's property.

Same authorities as Number I.

IV.

The Court erred in holding as a matter of law, in substance and effect (Opin., R. 76-78), that the statute, Sec. 2, Title 25, U. S. Code Annotated, imposing upon the Commissioner of Indian Affairs the management of all Indian Affairs, and designating him as the duly authorized officer to represent the United States in matters arising out of Indian relations, conferred power on such Commissioner to alienate any interest in the Shoshone's Treaty lands in violation of the express provision of a later statute (R. S., Sec. 2116; Sec. 177, Title 25, U. S. C. A.) reading as follows:

> "SEC. 177. No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution."

Same authorities as Number I.

V.

The Court erred in holding as a matter of law, in substance and effect (Opin., R. 76-78), that the statute, Sec. 2, Title 25, U. S. Code Annotated, imposing upon the Com-

missioner of Indian Affairs the management of all Indian Affairs, and designating him as the duly authorized officer to represent the United States in matters arising out of Indian relations, conferred power upon said Commissioner to violate and nullify Article Eleven of the Shoshone's 1868 Treaty, reading as follows:

> "ARTICLE 11. No treaty for the cession of any portion of the reservations herein described which may be held in common shall be of any force or validity as against the said Indians, unless executed and signed by at least a majority of all the adult male Indians occupying or interested in the same;"

Same authorities as Number 1.

VI.

The Court erred in holding as a matter of law, in substance and effect, that the Commissioner of Indian Affairs had the right and power to determine that the Arapahoes had any rights to the land embraced within the Shoshone Treaty Reservation, in violation of the statutes of the United States relating to disposal of any interest in Indian Tribal Lands, under the findings of the Court of Claims that the Shoshone Tribe never consented to admit the Arapahoes amongst them on said Reservation as permanent occupants and that no legal consent, agreement, or contract, had ever been entered into between the Shoshone Tribe and the Arapahoe Tribe or the United States whereby the Shoshone surrendered any rights in and to said Reservation to the Arapahoes (Finding 10, R. 45, 48; Opin., R. 70).

Same authorities as Number I.

VII.

The Court erred as a matter of law, in allowing the Shoshones compensation, wholly inadequate, for the temporary

use and occupancy of the Reservation by the Arapahoes equally with the Shoshones and for the benefit and profit of the United States (Opin., R. 80-81), for only the period 1878 to 1891; the Court should have allowed the Shoshones compensation based on commercial value and profit to the United States and to the Arrapahoes for such temporary use and occupancy for the additional period 1891 to 1927, together with such additions thereto as may be required to produce the present full equivalent of such compensation paid contemporaneously with said temporary use and occupancy. Interest at a reasonable rate is a suitable measure by which to ascertain the amount which should have been addded (Finding 16, R. 53).

Authorities.

Johnson v. *United States,* 2 Ct. Cl. 391;
Johnson v. *United States,* 4 Ct. Cl. 248;
Pope v. *United States,* 26 Ct. Cl. 11;
Waite v. *United States,* 282 U. S. 508;
Phelps v. *United States,* 274 U. S. 341;
Jacobs v. *United States,* 290 U. S. 13.

VIII.

The Court erred in holding as a matter of law, in substance and effect, that the only effect of the Jurisdictional Act was to ratify a permanent taking in 1891 of an undivided half interest in the Shoshone Treaty Reservation (Opin., R. 77-78), when in law said Act, First, permitted the recovery of damages, if any, for the temporary use of an undivided half of said Reservation from 1878 to 1927 as under an implied lease; and, Second, provided that the decree of the Court should permanently take and cancel the Shoshone's treaty title to the Arapahoe allotments and to an undivided half interest in the unallotted tribal lands,

both provisions necessarily implying the constitutional right to just compensation.

Authorities.

Johnson v. *United States,* 2 Ct. Cl. 391;
Johnson v. *United States,* 4 Ct. Cl. 248;
Pope v. *United States,* 26 Ct. Cl. 11;
International Paper Co. v. *United States,* 282 U. S. 399;
Crozier v. *Fried-Krupp,* 224 U. S. 290.

IX.

The Court erred as a matter of law in failing to allow the Shoshones the just compensation required by the Fifth Amendment of the Constitution of the United States for the permanent taking of the Arapahoe allotments and the undivided half interest in the tribal lands of the Shoshone's Treaty Reservation, whether same occurred in 1891 or in 1927, in that the Court should have included in the judgment such addition to the value thereof at the time of the permanent taking as may be required to produce the present full equivalent of that value paid contemporaneously with the permanent taking. Interest at a reasonable rate is a suitable measure by which to ascertain the amount which should have been added.

Authorities.

United States v. *Creek Nation,* 295 U. S. 103;
Jacobs v. *United States,* 290 U. S. 13;
Seaboard Air Line R. Co. v. *United States,* 261 U. S. 299, 306;
Phelps v. *United States,* 274 U. S. 341;
Waite v. *United States,* 282 U. S. 508;
Yankton Sioux Tribe of Indians v. *United States,* 272 U. S. 351, 65 Ct. Cls. 423.

Summary of Argument.

1. The Commissioner of Indian Affairs was without power to take an undivided half interest in the Shoshone's Treaty Reservation for the use of the United States and the Arapahoe Tribe, or to destroy the corpus of the trust estate rather than administer the same.

2. The compensation allowed for the temporary use and occupation of the Shoshone's Reservation is inadequate, both as to time allowed for and amount thereof.

3. The permanent taking of an undivided half interest in the Shoshone's Reservation occurred in 1927 upon the passage of the Jurisdictional Act and the bringing of this suit thereunder, and not otherwise.

4. Just compensation requires that the Shoshones be awarded such sum, in addition to the value of the use, at the time of such use, and in addition to the value of the land at the time of annulling and cancelling the title, as will produce the present full equivalent of those values paid contemporaneously. Interest at a reasonable rate is a proper and convenient method to ascertain the amount to be added.

ARGUMENT.

Assignments of Error I to VI.

The first six assignments of error relate to the legal significance and effect attributed by the Court of Claims in its decision herein, to the letter and holding of the Commissioner of Indian Affairs of August 13, 1891, and to the manner in which Indian titles may be taken. Therefore, these six assignments of error will be considered together.

Following is a pertinent extract from the Special Findings of Fact (Finding 11, R. 50-51):

> "No definite action was ever taken by the officials of the Government with reference to the permanent settlement of the Arapahoes until August 13, 1891. Shortly prior to that date a commission, known as the 'Woodruff Commission,' had been sent to the Shoshone Reservation to negotiate for a cession of such portion of the Reservation as the Indians chose to dispose of. On August 5, 1891, the chairman of the Commission wrote the Commissioner of Indian Affairs asking for instructions as to how the Commission should treat with the Indians, inasmuch as Chief Washakie and the Shoshones denied that the Arapahoes had any rights to or upon the reservation. He stated that the Shoshones insisted that the Arapahoes came there merely as temporary visitors; that the claim of the Shoshones to the whole of the reservation was backed by Dr. James Irwin, who was present and discussed the matter of the presence of the Arapahoes with Chief Washakie and the Shoshones shortly before their arrival at the Shoshone Reservation in March 1878. In reply the Commissioner of Indian Affairs, on August 13, advised the Commissioner that 'this office holds * * * that the Arapahoes have equal rights to the land on the said reservation which does not depend upon the further consent of the Shoshones, and you should conduct your negotiations with them upon that basis and with that understanding.' This is the only action ever taken by anyone representing the United States with reference to the permanent settlement and location of the Northern Arapahoe Band of Indians upon the Shoshone Reservation. Notwithstanding the continued protests of the Shoshones, the Woodruff Commission proceeded to counsel alike with the Shoshone and the Arapahoe Indians. The result of these negotiations will be further referred to hereinafter. The ruling made by the Commissioner of Indian Affairs on August 13, 1891, has ever since been enforced by the Interior Department. No action, ex-

cept the enactment of the Jurisdictional Act in this case, was ever taken by Congress with reference to the presence of the Arapahoe Indians upon the Shoshone Reservation."

The opinion states (R. 75-76):

"We are of opinion that the Government, through the Commissioner of Indian Affairs, who by statute was charged with the management of all Indian affairs and all matters arising out of Indian relations under direction of the Secretary of the Interior, and agreeably to such regulations as the President might prescribe, took from the plaintiff tribe an undivided one-half interest in all property and property rights to which they were entitled by law for the benefit of the Northern Arapahoe Indians; and that this action of the Government, acting through the Commissioner of Indian Affairs, occurred on August 13, 1891, when that official definitely held that 'this office holds that the Arapahoes have equal rights to the land on the said reservation which does not depend upon the further consent of the Shoshones' (Finding 11). Prior to that time—that is, from the period March 18, 1878, until August 1891—the Arapahoes simply resided upon, used, and occupied the reservation equally with the Shoshones as a result of the errors and misunderstandings by the officials charged by law with the management of all Indian affairs as to the willingness and consent of the Shoshones to admit the Arapahoes amongst them, without any definite action having been taken in regard to the matter when the error was first called to the attention of the proper officials."

The opinion states (R. 78):

"For the reasons stated, it is our opinion that an undivided one-half interest in plaintiff's reservation was taken from them for the benefit of the Northern Band of Arapahoes on August 13, 1891, and that the

> plaintiff tribe is entitled to recover the value of an undivided one-half interest in the reservation on that date."

Petitioner respectfully submits that the Commissioner of Indian Affairs was without authority to divest the Shoshones of lands and rights in the reservation held by them under their Treaty of 1868. The opinion holds (R. 76-77), that by Sec. 2, U. S. Code Annotated, Title 25, the Commissioner of Indian Affairs, the official directly charged with the administration and management of all Indian affairs, is vested with authority and jurisdiction, by writing a letter, to take from the Shoshones their land and Treaty rights. It should be borne in mind that Sec. 2 of Title 25 giving the Commissioner of Indian Affairs the management of all Indian affairs, was the act of July 9, 1832 (4 Stat. 564). In 1834 Congress enacted R. S., Sec. 2116; Sec. 177, 25 U. S. Code Annotated, as follows:

> "No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution."

In 1868 the Shoshone Treaty was made and was later duly ratified and proclaimed and became supreme law of the land. It provided, with respect to the lands on the Shoshone Reservation (Finding 2, R. 36):

> "ARTICLE 11. No treaty for the cession of any portion of the reservations herein described which may be held in common shall be of any force or validity as against the said Indians, unless executed and signed by at least a majority of all the adult male Indians occupying or interested in same."

The Shoshone Treaty also provided, Art. 2, that any other tribes which the Shoshones might be willing to ad-

mit amongst them could only be admitted "with the consent of the United States" (Finding 2, R. 33). Such consent could be given only by Congress.

It is respectfully submitted that the power and jurisdiction attributed to the Commissioner of Indian Affairs in the Court's decision herein is without support in, and is contrary to, the authorities.

Leecy v. *United States*, C. C. A., 8th Circuit, 190 Fed. 289. Appeal dismissed on motion of Solicitor General, 232 U. S. 731.

Complainant, a Chippewa Indian, was entitled under Act of Congress to an allotment of land on the White Earth reservation. She selected and applied for a certain 80 acre tract chiefly valuable for pine timber growing thereon. The United States Indian Agent on the reservation had set the land apart as a sawmill reserve for general reservation purposes and for lumber to build houses for the Indians. The agent's action was approved by the Secretary of the Interior. The court said:

> "There is only one question in this case, and that is: Did the Indian agent or the Secretary of the Interior have any rightful authority to withdraw the land in question from allotment for the purposes set up in the answer. * * *
>
> "Section 441, Revised Statutes (U. S. Comp. St. 1901, p. 252):
>
> " 'The Secretary of the Interior is charged with the supervision of public business relating to the following subjects: * * * Third—The Indians.'
>
> "Section 463, Revised Statutes, (U. S. Comp. St. 1901, p. 262):
>
> " 'The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may

prescribe, have the management of all Indian affairs, and of all matters arising out of Indian relations.'

"None of these provisions conferred the power claimed. * * *

"Congress authorized the allotment of these lands, and if the Secretary of the Interior could under his authority withdraw a portion of them from allotment he could withdraw substantially all of them, if that seemed in his judgment best, and under the contention of the government he would be executing an allotment law under rules and regulations prescribed, when in fact he nullified the law by withdrawing the very lands from allotment which Congress had authorized to be so distributed. The law was to be executed under, not nullified by, rules and regulations."

"A strong argument is made tending to show that power should be vested in the President or some other officer of the government to withhold from allotment lands specially needed for use of the tribe as a whole, but such arguments should be addressed to Congress rather than to the courts. If such a law would be wise, that is no reason why an executive department should make one, or the courts sustain it in doing so."

United States v. *Creek Nation,* 295 U. S. 103.

"But this power to control and manage was not absolute. While extending to all appropriate measures for protecting and advancing the tribe, it was subject to limitations inhering in such a guardianship and to pertinent constitutional restrictions. It did not enable the United States to give the tribal lands to others, or to appropriate them to its own purposes, without rendering or assuming an obligation to render, just compensation for them; for that 'would not be an exercise of guardianship, but an act of confiscation.' Lane *v.* Santa Rosa, 249 U. S. 110 ,113; Cherokee Nation *v.* Hitchcock, 187 U. S. 294, 307, 308." * * *

Borax Consolidated v. *City of Los Angeles,* 296 U. S. 10.

"'Of course,' said the Court in St. Louis Smelting & Ref. Co. *v.* Kemp, 104 U. S. 636, 641, 26 L. ed. 875, 876, 'when we speak of the conclusive presumptions attending a patent for lands, we assume that it was issued in a case where the department had jurisdiction to act and execute it; that is to say, in a case where the lands belonged to the United States, and provision had been made by law for their sale. If they never were public property, or had previously been disposed of, or if Congress had made no provision for their sale, or had reserved them, the department would have no jurisdiction to transfer them, and its attempted conveyance of them would be inoperative and void, no matter with what seeming regularity the forms of law may have been observed.' • • •

"Here, the question goes to the existence of the subject upon which the Land Department was competent to act. Was it upland, which the United States could patent, or tideland, which it could not? Such a controversy as to title is appropriately one for judicial decision upon evidence, and we find no ground for the conclusion that it has been committed to the determination of administrative officers."

United States v. *Carpenter,* 111 U. S. 347.

"Syl. 1. Where land is reserved for the use of an Indian Tribe by treaty, it cannot be taken up, either by settlement or by location, under the Louisiana Agricultural College scrip."

"Syl. 2. The treaty is notice that the land will be retained by the Government for the use of the Indians, and this purpose cannot be defeated by the action of any officers of the land department."

Lane, Secretary of the Interior, v. *Pueblo of Santa Rosa,* 249 U. S. 110, 113.

"The defendants assert with much earnestness that the Indians of this pueblo are wards of the United States,—recognized as such by the legislative and executive departments,—and that in consequence the disposal of their lands is not within their own control,

but subject to such regulations as Congress may prescribe for their benefit and protection. Assuming, without so deciding that this is all true, we think it has no real bearing on the point we are considering. Certainly it would not justify the defendant in treating the lands of these Indians—to which, according to the bill, they have a complete and perfect title—as public lands of the United States, and disposing of the same under the Public Land Laws. That would not be an exercise of guardianship, but an act of confiscation. Besides, the Indians are not here seeking to establish any power or capacity in themselves to dispose of the lands, but only to prevent a threatened disposal by administrative officers in disregard of their full ownership."

Pueblo of Santa Rosa v. *Fall*, 273 U. S. 315, 320-1.

In this case the Court held that a deed to lands belonging to an Indian village, executed by the captain of the village, was void because not executed as required by the Statute.

"Section 2116 declares that no 'conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. These sections apply here whether the Indians concerned are to be classified as nomadic or Pueblo Indians. United States *v.* Candelaria, 271 U. S. 432, 441, 442. None of their requirements can be dispensed with and it does not appear that in respect of most of them there was even an attempt to comply. See and compare, Green *v.* Menominee Tribe, 233 U. S. 558, 568; Lease of Indian Lands for Grazing Purposes, 18 Ops. Atty. Gen. 497. • • •"

18 *Opinions Attorney General*, 235-237.

" 'This statutory provision (R. S. 2116) is very general and comprehensive. Its operation does not de-

> pend upon the nature or extent of the title to the land which the tribe or nation may hold. Whether such title be a fee simple, or a right of occupancy merely, is not material; in either case the statute applies. It is not, therefore, deemed necessary or important, in connection with the subject under consideration, to inquire into the particular right or title to the above mentioned reservations held by the Indian tribes or nations respectively which claim them. Whatever the right or title may be, each of these tribes or nations is precluded, by the force and effect of the statute, from either alienating or leasing any part of its reservation, or imparting any interest or claim in or to the same, without the consent of the Government of the United States. * * *'
>
> "'I submit that the power of the Department to authorize such leases to be made, or that of the President or Secretary to approve or to make the same, if it exists at all must rest upon some law, and therefore be derived from either a treaty or a statutory provision.'"

In 1896 Petitioner Indians ceded to the United States a tract of land in the northeast corner of the Reservation. Over the protest of the Shoshones the Arapahoes were permitted to participate in the council and to join in the cession agreement on condition that a provision protecting the Shoshone's treaty rights be inserted therein (Finding 14, R. 52). This agreement was ratified by Congress on June 7, 1897 (30 Stat. 62). Again in 1904 there was a cession of a portion of the Reservation and the representative of the United States met the same situation respecting the objections of the Shoshones to the presence of the Arapahoes and overcame same by inserting in the agreement a provision protecting the Shoshone's treaty rights. This agreement was approved by Congress March 3, 1905 (33 Stat. 1016) (Finding 15, R. 53).

From these findings by the Court it is manifest that Congress in 1897 and in 1905, by enacting the appropriate res-

ervations in each of said agreements, adhered to and preserved for the Shoshones all benefits to which they were entitled under their 1868 treaty stipulations. These acts of Congress were, respectively, six and fourteen years subsequent to the Commissioner's letter of 1891. The 1891 letter did not deter Congress from honoring and adhering to its solemn treaty stipulations and Congress continued so to do by the Jurisdictional Act of March 3, 1927, wherein it provided the manner and the method to acquire the title to an undivided half interest in the Shoshone's treaty reservation.

It is submitted that the foregoing authorities amply sustain the first six assignments of error. The "holding" of the Commissioner of Indian Affairs of August 13, 1891, was void and of no legal efficacy so far as concerned a permanent taking of any interest in the Shoshone Treaty Reservation lands. And that holding did not increase in legal power and efficacy with the passing years. It was just as void in 1927, when Congress enacted the Jurisdictional Act, providing for the cancellation of the Shoshone title by a suit under said act, as it was in 1891. The Act of 1927 and the suit thereunder passed the title.

Assignment of Error VII.

Accepting the authorities and law as to assignments of Error I to VI, viz., that there was no permanent taking until 1927, then it follows that assignment VII should be sustained, viz., compensation should be allowed for temporary use and occupancy from 1878 to 1927, instead of only from 1878 to 1891.

Johnson v. *United States,* 2 Ct. Cl. 391.

> Syl. VI. "The rule for the measure of damages for the temporary occupation of lands by the government is the value of such temporary occupancy at the time of entry, as though the claimant had leased and the

government had rented the premises, regard being paid to the nature of the occupancy and to the fact that the government has the option of discontinuing the implied tenancy on any day or of continuing it indefinitely."

Johnson v. *United States*, 4 Ct. Cl. 248.

"Ejectment * * * does not lie against the Government. * * *

"But when, in an action in the nature of ejectment, the claimant's 'right of property' is established, the Government will be deemed to have entered as his tenant under an implied lease, whereof the 'just compensation' secured by the Constitution to those whose property is taken for the public use is the rent. * * *

"When the Government has entered upon land, and holds under an implied lease, the measure of the damages must be limited to the value of the occupancy, as though the claimant had leased and the Government had rented the premises, regard being paid to the nature of the occupancy and to the fact that the Government holds the option of discontinuing the implied tenancy at any time, or continuing it indefinitely."

See also *Pope* v. *United States*, 26 Ct. Cl. 11.

It is further submitted that under the findings of the Court the award for temporary use and occupation is inadequate. In finding 16, R. 53, the value in 1891 of the undivided half interest in the reservation used by the Arapahoes is fixed at $2,050,597.50. For the use of this property the Shoshones are awarded $25,575 annually, which is at the rate of about 1¼% per annum of the value of the property used. The current, legal interest rate in Wyoming has never been less than 7%. An interest rate of only 4% annually on $2,050,000 would give an annual return of $82,000. For only the thirteen years mentioned in the finding this amounts to $1,066,000 instead of $332,475.

The Court, Opin., R. 81-82, holds that the Shoshones are entitled to damages for use and occupation of their reserva-

tion by the Arapahoes and that a reasonable allowance for such use and occupation is the sum of $25.00 per year for each Arapahoe. $25.00 per year per Indian is less than seven (7) cents a day for untrammeled use and occupation of over 2,000,000 acres of land, containing unlimited resources. Attention is especialy directed to the vivid description of this beautiful country, the home of the Shoshones, appearing in the Court's finding 5, R. 38-40. A few excerpts therefrom follow:

> "The plaintiff's reservation, set apart by the treaty of July 3, 1868, is located in the central-western part of Wyoming. * * * The reservation is protected from the elements by these two ranges of mountains; also by the Beaver Divide to the south. The ancient Indian name for the reservation is Warm Valley.
>
> "The reservation comprises the fairest and best-watered portion of the State of Wyoming. The character of the land ranges from precipitous mountains at the extreme north and west, down through heavily timbered upland, lower down through well-grassed bench land, to a series of river valleys with level, deep soil toward the eastern portion of the reservation * * * numerous fresh-water lakes well stocked with trout and waterfowl, and on whose banks live beaver, otter and other fur-bearing animals. The mountains contain more than 400,000 acres of spruce, pinon, hemlock, balsam, and yellow and white pine timber. The river valleys are level, easily irrigated, several miles in width, and contain a warm, rich, and productive soil. Stock lives the year around without other feed than being herded on the grasses growing from the mountain tops to the lowest valleys in greatest abundance, affording ample feed and range for livestock in the mountains in the summer season, and in the lower reaches of the reservation in the fall and winter seasons. The water is pure and the climate is mild and regular. The soil is rich and compares favorably in fertility to that of Illinois and Iowa. * * *

"The soil and climatic conditions on the reservation are well suited for the production of alfalfa, sweet clover, hard and soft wheat, oats, barley, corn, beans, peas, tomatoes, sugarbeets, garden vegetables, small fruits and melons. The land has a high average yield of crops.

"The reservation contained substantial deposits of coal, oil, gas, gypsum, and minerals. * * *

"The land on the reservation best suited for agricultural purposes lies toward the eastern portion thereof where the river valleys are wider, the soil deeper, and free from boulders, easy to irrigate, and nearer a railroad, and due to elevation, the growing season is from three to four weeks longer in the eastern portion of the reservation than in the western portion. The Arapahoes were placed on the eastern portion of the reservation. * * * Ample water is available to irrigate all agricultural land on the reservation. The reservation is supplied with sufficient water power for the production of water, electric light and power.

"At the time of the execution of the treaty of July 3, 1868, buffalo, elk, bear, antelope, deer and other wild animals suitable for food, were in great abundance on the reservation. Such game was native and indigenous to the mountains and valleys of the reservation and was found sufficiently adequate for subsistence of the Indians for many years. The plaintiff tribe of Indians went on annual hunts into the mountains for food, and the skins of certain wild animals were used for robes and other necessary uses for members of the tribe."

In the opinion (R. 79), the Court stated:

"It (Reservation) contained a large but undetermined quantity of oil and gas. * * * The oil and gas reserves alone were of great value in 1891. The Government for the purpose of this suit, fixed the 1926 present value of these reserves at $6,000,000."

At R. 82, the Court further stated:

"After they (Arapahoes) were placed upon the Shoshone Reservation in 1878, they used the same

> equally with the Shoshones by hunting, farming, pasturing their stock, building houses and fences, and sharing in the facilities of the agency and the employees provided by the Government for the Shoshone tribe'' (Finding 10, R. 50).

From the Court's description above noted, it must be conceded that the Shoshone Reservation was a most desirable country in which to live. It is unbelievable that for the mere pittance of less than seven cents a day allowed by the Court an Arapahoe Indian could have obtained anywhere in the United States the right and privilege to live on and roam over a tract of country, embracing over 2,000,000 acres, so generally desirable as is described above; to hunt in the mountains and fish in the streams to his heart's content; farm the land; pasture horses and cattle; cut timber for fires, homes, fences, corrals and teepee poles; cut and sell wood and hay to a Government military post (Finding 18, R. 54); obtain oil and coal for light and heat; gather fruits, berries, nuts, herbs, and vegetables; procure all the buffalo meat he could eat and sell what he could not dispose of; use or sell the hides, skins, robes, and horns; shoot all kinds of small game and share in the plentiful supply of antelope, deer, elk, bear, and other game animals and use the pelts, furs and skins for clothing and barter (Finding 5, R. 40). In short, all the wonderful resources of the Shoshone Reservation, affording an Indian subsistence, clothing, shelter and articles for barter, were at his daily disposal with little effort. There were ample resources of all kinds on the reservation—animal, vegetable, and mineral, as well as materials for shelter, warmth and comfort,—to supply all the requirements of the Indian mode of life and in addition furnish numerous articles of barter which brought cash money.

The Commissioner of Indian Affairs in his Annual Report for 1866, page 118, estimated the needs of the Pyra-

mid Reserve Indians for rations at 40 cents per day each; and in his report for 1869, page 246, he estimated the cost of subsistence of the Mescalero Apache Indians, consisting of full ration of beef and other necessaries, at approximately $60.00 a year per Indian.

The benefit accruing to the United States is an important element in fixing the value of the use and occupation. It largely benefited financially and otherwise by having placed the Arapahoes on the Shoshone Reservation. These Indians had proved a wily and rapacious tribe (Finding 8, R. 41-53; Opin., R. 82). Army officers protested against placing them on the Shoshone Reservation (Finding 10, R. 47). Had the Arapahoes not been placed on the Shoshone Reservation a separate reservation, promised them by treaty, would have been imperative which new reservation would have necessitated agency buildings, warehouses, mills, school houses, farmers, blacksmiths, teachers, physicians and other employes, and also additional appropriations for their support and maintenance (Finding 7, R. 41).

All the above items and the advantages accruing to the United States, it is submitted, should be taken into consideration in fixing a proper allowance for use and occupation. From a commercial standpoint it would have been impossible for a price of less than seven cents a day per Indian to have obtained the large and varied consideration furnished by the Shoshones to the Arapahoes and the Government; consequently justice requires that an allowance be granted commensurate with the value obtained from the Shoshones and enjoyed by the Arapahoes and the Government.

The Arapahoes had the use of the whole reservation in common with the Shoshones (Finding 10, R. 50), together with all its varied and valuable resources, and in addition thereto the advantages of the administrative, educational,

farming, and other facilities provided by the Shoshones (Opin., R. 82).

Present Full Equivalent Should Be Allowed.

In addition to proper compensation for the temporary use and occupancy from 1878 to 1927, there should be allowed such further amount as may be required to produce the present full equivalent of such compensation paid contemporaneously.

Phelps v. *United States,* 274 U. S. 341.

This was a case involving the question of compensation for the use of a pier, the lease on which was owned by plaintiffs. The use of the pier was requisitioned by the Secretary of War in 1917. The Court of Claims allowed compensation for the use, but disallowed the claim for additional amounts claimed as part of just compensation. This Court said:

> "Plaintiffs' property was taken before its value was ascertained or paid. Judgment in 1926 for the value of the use of the property in 1918 and 1919, without more, is not sufficient to constitute just compensation. Section 177 does not prohibit the inclusion of the additional amount for which petitioner contends. It is not a claim for interest within the purpose or intention of that section. Acts of Congress are to be construed and applied in harmony with and not to thwart the purpose of the Constitution. The government's obligation is to put the owners in as good position pecuniarily as if the use of their property had not been taken."

In connection with the Phelps case it should be noted that the Secretary of War did not take the title to the pier, nor the title to an undivided half interest thereof. He took merely the *use* of the pier.

Waite v. *United States,* 282 U. S. 508.

This was a suit to recover for the unlicensed use of a patented invention. The opinion states:

> "The statute grants 'recovery of his reasonable and entire compensation for such use.' We are of opinion that interest should be allowed in order to make the compensation 'entire.' In addition to the purpose of the word adverted to in Richmond Screw Anchor Co. *v.* United States, 275 U. S. 331, 343, we cannot doubt that it was intended to accomplish complete justice as between the plaintiff and the United States."
>
> *Jacobs* v. *United States,* 290 U. S. 13.

> "The fact that condemnation proceedings were not instituted and that the right was asserted in suits by the owners did not change the essential nature of the claim. *The form of the remedy did not qualify the right.* It rested upon the Fifth Amendment. Statutory recognition was not necessary. A promise to pay was not necessary. Such a promise was implied because of the duty to pay imposed by the Amendment. The suits were thus founded upon the Constitution of the United States. U. S. C. Title 28, Sec. 41 (20). * * * (Italics ours.)
>
> "The owner is not limited to the value of the property at the time of the taking; 'he is entitled to such addition as will produce the full equivalent of that value paid contemporaneously with the taking.' Interest at a proper rate 'is a good measure by which to ascertain the amount so to be added.' "

Assignment of Error VIII.

The language of the Jurisdictional Act is clear. It provides, Sec. 3 (R. 3):

> "In reference to all claims which may be the subject matter of the suits herein authorized, the decree of the court shall be in full settlement of all damages, if any, committed by the Government of the United States and shall annul and cancel all claim, right, and title of the said Shoshone Indians in and to such money, lands, or other property."

The foregoing contemplates two things. First, recovery for the damages, if any, for the temporary use of an undivided half of the Shoshones' reservation from 1878 to 1927. That use was an accomplished fact when the Jurisdictional Act was passed. Whether the Commissioner of Indian Affairs had the power and authority to temporarily use the Shoshones' reservation as a home for the wandering Arapahoes, or whether he enforced such temporary use unlawfully, at any rate he had done that very thing. So the fact of the use stood accomplished and Congress authorized suit for damages therefor.

But Congress recognized that whatever claims the Commissioner may have asserted as to permanently taking a half interest in the lands of the reservation were without foundation. He had no such power. Congress also recognized that permanent provision must be made for the Arapahoes, otherwise there would be a constant recurrence of the Shoshones' claim for temporary use and occupation. Therefore, Congress provided, second:

> * * * "the decree of the court shall * * * annul and cancel all claim, right, and title of the Shoshone Indians in and to such money, lands, or other property."

Unless Congress had recognized the distinction between damages for the temporary use, and compensation for the permanent taking, the words last above quoted are superfluous. Congress knew that nothing the Commissioner had done, or could do, could annul and cancel the Shoshones' Treaty title.

The Court of Claims, in rejecting plaintiff's contention above, statees (Opin., R. 78):

> "In *Crozier* v. *Fried, Krupp Aktiengesellschaft,* 224 U. S. 290, it was held that 'The adoption by the United States of the wrongful act of an officer is of course an

> adoption of the act when and as committed and causes such act of the officer to be, in virtue of the statute, a rightful appropriation by the Government, for which compensation is provided.' In that case the court was construing the act of 1910 authorizing suits against the United States for patent infringement, and the issue involved a patent which had been used without permission of the owner by an officer of the United States prior to the passage of that act."

It is respectfully submitted that the analogy fails. In the *Crozier* case, neither General Crozier nor the Government ever claimed to take title to the Fried-Krupp patent. They simply *used* it, temporarily, in furtherance of the business of the United States, viz., the manufacture of guns, just as the Indian Office *used* the Shoshones' Reservation temporarily in furtherance of the desire and duty to provide facilities for the Arapahoes. There was no attempt to take the title to the patent away from Fried-Krupp. The language of the opinion of this Court is clear. It quotes the Statute, as follows:

> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That whenever an invention described in and covered by a patent of the United States shall hereafter be used by the United States without license of the owner thereof or lawful right to use the same, such owner may recover reasonable compensation for such use by suit in the Court of Claims." * * *

The opinion then continues:

> "The text of this statute leaves no room to doubt that it was adopted in contemplation of the contingency of the assertion by a patentee that rights secured to him by a patent had been invaded for the benefit of the United States by one of its officers; that is, that such officer, under the conditions stated, had infringed a patent."

At numerous other places in the opinion are clear indications that what this Court was considering was only the *use* of the Fried-Krupp patent, and that the adoption by the United States of General Crozier's *use* was an adoption of such act when and as committed. In the instant case the United States has adopted the act of the Indian Office in *using* the Shoshone Treaty lands. But Congress went a step further and provided for permanently acquiring title thereto.

The Johnson and Pope cases in the Court of Claims, cited *supra* under VII, are clear as to the nature of the temporary use and occupancy of the Shoshone's Reservation up to the date of the Jurisdictional Act and this suit thereunder.

Assignment of Error IX.

Petitioner submits that just compensation includes such addition to the value of the property at the time of the permanent taking as may be required to produce the present full equivalent of that value paid contemporaneously. The *Phelps* and *Jacobs* cases, cited under Assignment VII, *supra,* are conclusive on this point. They are referred to in the foot notes to the recent case of:

United States v. *Creek Nation,* 295 U. S. 103.

> "But the just compensation to be awarded now should not be confined to the value of the lands at the time of the taking but should include such addition thereto as may be required to produce the present full equivalent of that value paid contemporaneously with the taking. Interest at a reasonable rate is a suitable measure by which to ascertain the amount to be added. The treaty of 1866, the act of 1889 and other statutes show that five per cent per annum is a reasonable rate as between the parties here."

The Court of Claims in its order of June 1, 1936 (R. 99), states:

> "If the court had been dealing with similar questions between private parties or between the Government and a citizen, conclusions more favorable to the plaintiff as to the date of taking and the matter of interest probably would have been compelled by the facts and circumstances."

Indians are citizens of the United States, such citizenship having been conferred by the Act of Congress of June 2, 1924 (43 Stat. 253). See 4 Kappler, 1165.

By the General Allotment Act of Feb. 8, 1887, Sec. 6 (24 Stat. 388), Congress declared that Indians so allotted shall become citizens of the United States and of the State in which they reside.

Indians and Indian tribes come within the protection of the Constitution. In *United States* v. *Creek Nation, supra,* this Court stated:

> "While extending to all appropriate measures for protecting and advancing the tribe, it was subject to limitations inhering in such a guardianship and to pertinent constitutional restrictions. It did not enable the United States to give tribal lands to others, or to appropriate them to its own purposes, without rendering, or assuming an obligation to render, just compensation for them; for that 'would not be an exercise of guardianship, but an act of confiscation.' Lane *v.* Pueblo of Santa Rosa, 249 U. S., 110-13; Cherokee Nation *v.* Hitchcock, 187 U. S. 294, 307-8."

See also *Cherokee Nation* v. *So. Kans. R. R. Co.,* 135 U. S. 641; *U. S.* v. *Mille Lac Band of Chippewa Indians,* 229 U. S. 498, holding that property of Indian tribes comes within the rule of just compensation.

It would appear that as guardian of the Indians, both as individuals and as tribes, the United States is more

strictly obligated to act justly toward the Indians than in similar cases of whites against the Government where such guardianship does not exist. This thought is cogently expressed by the Supreme Court in *Choctaw Nation* v. *United States*, 119 U. S. 1:

> "The recognized relation between the parties to this controversy is that between a superior and an inferior, whereby the latter is placed under the care and control of the former, and which, while it authorizes the adoption on the part of the United States of such policy as their own public interests may dictate, recognizes on the other hand such an interpretation of their acts and promises as justice and reason demand in all cases where power is exercised by the strong over those to whom they owe care and protection. The parties are not on an equal footing and that inequality is to be made good by the superior justice which looks only to the substance of the right without regard to technical rules framed under a system of municipal jurisprudence, formulating the rights and obligations of private persons equally subject to the same laws."

The Court of Claims states (R. 78):

> "Moreover, the rules with reference to condemnation proceedings and the taking of private property for public use are not entirely applicable to cases such as the one at bar. The Indian tribes were under the control, care, and protection of the United States and although they could not legally be deprived of any property secured to them by treaty, agreement or act of Congress, the legal title to lands embraced in reservations set apart for the absolute and undisturbed use and occupancy of Indians remained in the United States."

There is no logical reason to discriminate against Indian tribes as compared with private parties merely on the ground that the naked legal title resides in the United

States. It is well known that such legal title was retained solely so that it should not pass into foreign hands. As said by the Supreme Court in *Leavenworth L. & Co.* v. *United States*, 92 U. S. 733,

> "As long ago as in Cherokee Nation vs. Georgia, 5 Peters 1, this court said that the Indians are acknowledged to have the unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to the Government; and recently, United States *v.* Cook, 19 Wall. 591, this right of occupancy has been said to be sacred as the title of the United States to the fee. Unless the Indians were deprived of the power of alienation, it is easy to see that they could not peaceably enjoy their possessions with a superior race constantly encroaching on their frontier. * * * This perpetual right of occupancy, with the correlative obligation of the Government to enforce it, negatives the idea that Congress, even in the absence of any positive stipulation to protect the Indians, intended to grant their lands to a railroad company, either absolutely or *cum onere*. For all practical purposes, the Osages owned the lands, as the actual right of possession, the only thing they deemed of value, was secured to them by the treaty of June 2, 1825, until they should elect to surrender it to the United States. In the free exercise of their choice, they might occupy their lands forever, and whatever changed this condition or interferred with it, violated the guarantees under which they had lived since that date."

The cases of the Yankton Sioux Tribe of Indians in the Court of Claims and the Supreme Court of the United States are applicable to the situation here presented.

Yankton Sioux Tribe of Indians v. *United States*, 61 Ct. Cls. 40.

The Indians sought to recover for the value of the Pipestone Quarries, 648 acres of land in Minnesota, alleging

their ownership and claiming that the Government had wrongfully taken the lands. The Court of Claims found that the quarries were and ever had been open to the Indians to procure pipestone; that they had been deprived of no rights, and dismissed the petition. The decision of the Court of Claims was reviewed by the Supreme Court on certiorari in:

Yankton Sioux Tribe of Indians v. *United States,* 272 U. S. 351.

The Supreme Court reversed the decision of the Court of Claims stating:

> "It is quite clear from all the surrounding circumstances that the Indians understood that by this provision there was granted to them full ownership of the tract; and their claim to that effect they have always persistently and stoutly maintained."

After the reversal the case was disposed of in the Court of Claims in *Yankton Sioux Tribe of Indians* v. *United States,* 65 Ct. Cls. 428. In the body of the opinion the court recites the history of the case, the previous decision in 61 Ct. Cls. 40, and the reversal of that decision by the Supreme Court, stating:

> "The judgment dismissing the petition was reversed by the United States Supreme Court, 272 U. S. 351, 359, that court holding 'That the United States has taken and holds possession of the entire quarry tract of 648 acres * * * and since the Indians are the owners of it in fee, they are entitled to just compensation as for a taking under the power of eminent domain.'"

The finding and decision state:

> "Finding VIII. The market value of the Pipestone reservation in February, 1891, taking into considera-

tion its value for grazing and agricultural purposes, the value of its mineral rights, and its historical value, was $100,000.

"The Court decided that plaintiffs were entitled to recover as just compensation for the taking of the Pipestone Reservation $100,000 with interest from March 1, 1891, until paid."

Conclusion.

It is submitted that the foregoing facts and authorities establish that:

1. The Commissioner of Indian Affairs was without power to take an undivided half interest in the Shoshone's Treaty Reservation.

2. The compensation allowed for the temporary use and occupation is inadequate.

3. The permanent taking occurred in 1927; and

4. Such amounts must be added to the value of the use and to the value of the undivided half interest as will produce the present full equivalent paid contemporaneously.

Finally, let it be remembered, the Shoshones have ever been loyal and friendly to their Government and its citizens (Finding 4, R. 36-37).

"Their attitude toward the Government and its officers was always one of fullest cooperation and they always faithfully fulfilled their agreements and promises * * * he (Chief Washakie) and the members of his tribe implicitly trusted the Government not to overreach them * * * have been at peace with the the whites since they first encountered Lewis & Clarke in 1805 * * * Washakie took a large war party of the Shoshones across Big Horn Mountain as an ally of the United States to assist General Crook in his campaign against the Sioux on the Rosebud in 1876,

> and at other times furnished soldiers to aid the United States Army in its wars with Indians such as the Sioux, the Arapahoes and the Cheyennes. * * * In many instances the Shoshone Indians furnished aid and comfort to the white emigrants passing through their country on the Oregon Trail and assisted in protecting the whites from hostile Indians."

It is this simple, friendly, faithful people who now ask only for just compensation. Many of the wrongs they have suffered can never be redressed. Their diversified farm home has been broken up and they have been crowded back to the uplands, to the lighter soil and the boulders, while the Arapahoe intruders enjoy the fertile lower river valleys. They have had an alien enemy quartered on their lands, with all the attendant dread of savage methods of Indian warfare. Such elements of damage are not compensable in this case yet when, after all of these years, justice is meted out to the Shoshones it is submitted that it should be measured with no niggardly and reluctant hand. Let it be that just compensation which should flow from a rich and powerful nation dealing with a weak, untutored but trusting and ever loyal friend.

Respectfully submitted,

THE SHOSHONE TRIBE OF INDIANS OF THE WIND RIVER RESERVATION IN WYOMING,
By GEORGE M. TUNISON,
Counsel for Petitioner.

CHARLES J. KAPPLER,
ALBERT W. JEFFERIS,
FRANCIS S. HOWELL,
Of Counsel.

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In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 328

THE UNITED STATES, PETITIONER

v.

SHOSHONE TRIBE OF INDIANS OF THE WIND RIVER RESERVATION IN WYOMING.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Claims entered in this cause on December 2, 1935, motions for a new trial and amendment of findings being denied on June 1, 1936. This is a cross-petition for a writ of certiorari, the petition on behalf of the Shoshone Indians having been filed on July 22, 1936, as No. 216.

OPINION BELOW

The opinion of the Court of Claims (R. 69–97) has not yet been reported. Its memorandum and order overruling motions for a new trial and amendment of findings appears at R. 98–100.

JURISDICTION

The judgment of the Court of Claims was entered December 2, 1935 (R. 97). Motions for a new trial and amendment of findings were denied June 1, 1936 (R. 98). The jurisdiction of this Court is invoked under Section 1 of the Act of March 3, 1927, c. 302, 44 Stat., Part 2, p. 1349, and Section 3 (b) of the Act of February 13, 1925, c. 229, 43 Stat. 936, 939 (U. S. C., Title 28, Section 288).

QUESTIONS PRESENTED

1. Whether the Shoshone Tribe of Indians, who had been placed upon a reservation set apart for them under the Treaty of 1868, suffered a permanent taking of their right to the exclusive use and occupancy of the reservation when the United States Government in 1878 placed the Northern Arapahoe Indians thereon without the consent of the Shoshones and continually thereafter kept them there over the objection and protest of the Shoshones.

2. Whether the Act of March 3, 1883, granted to the Shoshone Tribe rights additional to those granted them in the Treaty of 1868.

TREATY AND STATUTES INVOLVED

The pertinent portions of the Treaty of July 3, 1868, 15 Stat. 673, with the Shoshone tribe are printed at R. 32–36. The pertinent portion of the Act of March 3, 1883, c. 141, 22 Stat. 582, 590 (U. S. C., Title 25, Sec. 155), is printed at R. 79.

The Jurisdictional Act of March 3, 1927, c. 302, 44 Stat., Part 2, p. 1349, is printed at R. 1–3.

STATEMENT

The pertinent facts, as established by the findings of the Court of Claims, are as follows:

In 1868 a treaty was entered into between the United States and the Shoshone Tribe of Indians (R. 32–36). Under Article 2 thereof it was agreed that a specified body of land, now within the State of Wyoming, should be and was thereby

> * * * set apart for the absolute and undisturbed use and occupation of the Shoshone Indians * * *, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them * * *

The Shoshones immediately thereafter went upon the land so designated and have since remained there (R. 36).

About October 1, 1877, a delegation of Sioux and Arapahoe Indians called upon the Commissioner of Indian Affairs and the President to discuss the matter of their location upon some reservation. One Irwin, who had been an agent at the Shoshone reservation but who was then the agent having supervision over the Northern Arapahoes, was present (R. 43–44). After the discussion of this matter with the Indians, and on October 4, 1877, the Commissioner of Indian

Affairs requested the Secretary of the Interior that Irwin

> * * * be authorized to proceed to the Shoshone Reservation in Wyoming and consult with the Indians there, with the intent to gain their consent to permit the Arapahoes (now at Red Cloud Agency) to remove to their (the Shoshone) reservation, both tribes to be under the control of one agent (R. 44).

Thereupon Irwin was authorized and directed to proceed at once to the Shoshone Reservation and consult with the Indians there, with the intent of gaining their consent to the placing thereon of the Northern Arapahoes (hereafter called the Arapahoes), both tribes to be under one agent, and with instruction to represent to them the advantage of having a friendly neighboring tribe associated with them, and to present such arguments as would obtain their ready consent to the proposed arrangement (R. 44). Agent Irwin proceeded to the Shoshone Reservation (R. 44), and, after a council upon the subject with them and their chief, sent a telegram to the Commissioner of Indian Affairs at Washington, dated Cheyenne, Wyoming, October 17, 1877, as follows (R. 44–45):

> I returned from Shoshone Agency today. Held council and made peace between Shoshones and Arapahoes.

The Annual Report of the Commissioner of Indian Affairs, dated November 1, 1877, stated in

substance that pursuant to their request on their recent visit to Washington permission had been given the Arapahoes to join the Shoshones on the latter tribe's reservation, and that in a formal council held by Agent Irwin with the Shoshones their consent to the arrangement desired by the Arapahoes was obtained, and the removal of the Arapahoes was then in progress (R. 74).

By April of 1878, most of the Arapahoes had been placed upon the Shoshone Reservation (R. 48). The Arapahoes thereafter remained on the reservation and used and occupied it equally with the Shoshones. They engaged in farming thereon and received the benefit of all its facilities equally with the Shoshones (R. 50).

The findings of fact and the opinion of the court below indicate that neither at the time of the council with Irwin nor at any other time did the Shoshones consent to admit the Arapahoes amongst them as permanent occupants of their reservation (R. 47–50, 70). The agent of the Shoshone Reservation made many reports prior to 1891, to the effect that the Shoshones claimed that the Arapahoes were wrongfully upon the reservation. No action was taken by the Interior Department upon these reports (R. 49–50).

Prior to August 13, 1891, a Commission known as the Woodruff Commission was sent to negotiate, on behalf of the United States, with the Indians of the Shoshone Reservation for a cession of such part thereof as the Indians would cede. On Au-

gust 5, 1891, the Chairman of the Commission wrote to the Commissioner of Indian Affairs asking for instructions because of the denial by the Shoshones that the Arapahoes had any rights in or upon the reservation (R. 50). In reply the Commissioner of Indian Affairs on August 13, 1891, advised the Commission that

> This office holds * * * that the Arapahoes have equal rights to the land on the said reservation which does not depend upon the further consent of the Shoshones, and you should conduct your negotiations with them upon that basis and with that understanding (R. 50).

Subsequently, by agreement of April 21, 1896, approved June 7, 1897, c. 3, 30 Stat. 62, 93, the Shoshones and Arapahoes ceded to the United States 55,040 acres of the reservation for a consideration of $60,000. Again on April 21, 1904, by an agreement approved March 3, 1905, c. 1452, 33 Stat. 1016, the Shoshones and Arapahoes ceded to the United States a tract of the reservation containing 1,480,000 acres, the United States agreeing to dispose of the same for the account of the Indians occupying the reservation. Each of these agreements contained a stipulation to the effect that nothing therein should be construed to deprive the Indians of any annuities or benefits to which they were entitled under existing agreements or treaty stipulations. After the foregoing cessions had been made the diminished reservation contained 808,500 acres (R. 52–53).

The Shoshone Indians brought suit against the United States in the Court of Claims under the Jurisdictional Act of March 3, 1927, for damages arising out of the placing of the Arapahoes upon the Shoshone tribe's reservation. The Court of Claims held that the Government took an undivided one-half interest in all property and property rights of the Shoshones in the reservation as of August 13, 1891, when the Commissioner of Indian Affairs "definitely held that 'the Arapahoes have equal rights to the land on the said reservation which does not depend upon the further consent of the Shoshones'" (R. 75). The court found that the fair and reasonable value of an undivided one-half interest of the Shoshone reservation on August 13, 1891, was $2,050,579.50 (R. 53), or $1.75 per acre (R. 79). The findings and the opinion show that this finding of value was based upon the facts that "It was known in 1891 that the Shoshone Reservation contained a large, but undetermined, quantity of coal, oil, and gas, phosphate and gypsum," (R. 53) and because the reservation contained a large area of fine grazing land from which considerable revenue was derived from grazing leases and also because it contained a large stand of excellent timber (R. 38–39, 79). The opinion discloses that the court deemed these elements of importance in determining the value of the land in 1891, because of the Act of March 3, 1883, which provided that "The proceeds of all pasturage and sales of timber, coal, or other product of any Indian

reservation, * * *, and not the result of the labor of any member of such tribe, shall be covered into the Treasury for the benefit of such tribe under such regulations as the Secretary of the Interior shall prescribe" (R. 79). The court, as its opinion shows, regarded this Act as conferring upon the Shoshones the beneficial right to all the net proceeds derived from the sales of timber and other products of the reservation (R. 81), a right additional to that of absolute and undisturbed use and occupation of the reservation guaranteed to the Shoshone tribe by the Treaty of 1868.

The court further held that during the period between 1878 and 1891, the Government maintained the Arapahoes on the Shoshone's reservation without their consent, that during this time no action was taken by the Government which gave the Arapahoes any rights to or upon the reservation, that there thus occurred a violation of Article 2 of the Treaty with the Shoshones of 1868, and that there thereby resulted benefits to the Government and damages to the Shoshones (R. 81–82). The court found that the fair and reasonable value of the use and occupancy of an undivided one-half of the Shoshone reservation by the Arapahoes between 1878 and 1891 was $332,475.00 (R. 53). It arrived at this figure by determining that the average annual population of the Arapahoe tribe on the reservation between 1878 and 1891 was 1,023, and that an allowance should be made to the Sho-

shones of $25.00 a year for each of these Indians during the thirteen year period (R. 82).

As a result of these and other items not here involved the court found that the Shoshone tribe was entitled to recover $2,483,467.99, against which, however, the Government was entitled to an offset of $1,689,646.50, leaving a balance of $793,821.49, for which the court entered a judgment for the Shoshones (R. 97).

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that there was a "taking" by the Government of an undivided one-half interest in the Shoshone reservation for the benefit of the Arapahoes when the Commissioner of Indian Affairs on August 13, 1891, advised the Woodruff Commission that the Arapahoes had equal rights in the reservation which did not depend upon the further consent of the Shoshones.

2. In not holding that the "taking" occurred in 1878 when the Arapahoes were removed by the Government to the Shoshone reservation without the consent of the Shoshones and thereafter maintained there over the continued objection and protest of the Shoshones.

3. In holding that the Act of March 3, 1883, granted the Shoshones an interest in and to the reservation in addition to those interests which were granted by the Treaty of 1868.

REASONS FOR GRANTING THE WRIT

1. By the Treaty of 1868 the Shoshone Reservation was "set apart for the absolute and undisturbed use and occupation of the Shoshone Indians * * *, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them." The findings and opinion of the Court of Claims show that the Arapahoes were placed by the Government on the Shoshone reservation in 1878 without the consent of the Shoshones (except for a brief temporary period), and were thereafter continually kept there over the objection and protest of the Shoshones. The fact that the Arapahoes were removed to the Shoshone reservation upon the mistaken assumption that the consent of the Shoshones had been obtained or the fact that the Indians may have understood that provision would later be made for a separate reservation for the Arapahoes (R. 76) does not alter the situation that there is nothing in the findings or the opinion below from which the conclusion can be deduced that the Arapahoes were placed on the Shoshone reservation for any mere temporary purpose. Those in charge of Indian Affairs thought they had the consent of the Shoshones to the removal of the Arapahoes for permanent settlement and they thereafter continually kept the Arapahoes upon the reservation despite the repeated objections and protests of the Shoshones.

The so-called ruling of the Commissioner of Indian Affairs of August 13, 1891, which the court below held constituted the taking, did not alter what had become a *fait accompli*. That merely announced that the Woodruff Commission in treating with the Indians for a cession of a part of the reservation were entitled to treat with both the Shoshones and the Arapahoes "as the Arapahoes have equal rights to the land on the said reservation which does not depend upon the further consent of the Shoshones" (R. 50). It did not purport to "take" any interest of the Shoshones. That had already been accomplished. Although based upon a mistaken assumption, it was merely a declaration that the Arapahoes had already acquired equal rights in the reservation. The permanent deprivation of the Shoshones' right to the exclusive use and occupancy of their reservation occurred when the Government, believing it was proceeding in accordance with the treaty, removed the Arapahoes to the Shoshone reservation and thereafter kept them there despite the persistent protest and objection of the Shoshones. From the standpoint of a "taking" the pronouncement of August 13, 1891, certainly had no greater efficacy than did the erroneous statement referred to in the opinion below (R. 74), which the Commissioner of Indian Affairs made in his Annual Report of November 1, 1877, prior to the removal of the Arapahoes to the Shoshone reservation, to the ef-

fect that the consent of the Shoshones to the Arapahoes' removal had been obtained at the council held by Agent Irwin with the Shoshones in October, 1877 (R. 45). The only conceivable bearing that either of these statements could have on the case would be one which obviously supports the Government's position, i. e., a recognition that the removal of the Arapahoes to the Shoshone reservation which had been or was to be accomplished was one not for some mere temporary purpose but one which was permanent in character because based supposedly upon the consent which had been given by the Shoshones in accordance with their treaty. That Congress was aware that the Arapahoes were permanently located on the Shoshone Reservation prior to 1891 is shown by the fact that in many Acts passed prior to that year it made appropriations for uses of a permanent nature "for the Northern Cheyennes and Arapahoes in Wyoming and on the Tongue River in Montana."[1] The Arapahoes on the Wind River Reservation were the only Arapahoes in Wyoming. The "taking", we submit, occurred when the Government in 1878, without the consent of the Shoshones, removed the Arapahoes to their reservation for permanent oc-

[1] See the Acts of July 4, 1884, c. 180, 23 Stat. 76, 82; March 3, 1885, c. 341, 23 Stat. 362, 369; May 15, 1886, c. 333, 24 Stat. 29, 35; March 2, 1887, c. 320, 24 Stat. 449, 455; June 28, 1888, c. 503, 25 Stat. 217, 223; March 2, 1889, c. 412, 25 Stat. 980, 987; August 19, 1890, c. 807, 26 Stat. 336, 343; March 3, 1891, c. 543, 26 Stat. 989, 996.

cupation and thereafter maintained them there over the repeated objection and protest of the Shoshones.

The question as to the date of taking is of particular importance in this case because of the utilization by the court below of the Act of March 3, 1883, in determining the measure of damages. That Act provided that "the proceeds of all pasturage and sales of timber, coal, or other product of any Indian reservation * * *, and not the result of the labor of any member of such tribe shall be covered into the Treasury for the benefit of such tribe under such regulations as the Secretary of the Interior shall prescribe * * *." If the taking occurred in 1878, as contended by the Government, it is admitted by the court below that the only title which the Shoshone Indians had to their reservation "consisted merely of the right to use and occupy the lands" (R. 81). In consequence the only damages to which the Shoshones would be entitled on account of the taking would be such as were measured solely by a deprivation of the right of use and occupancy. In holding, however, that the taking occurred in 1891, after the passage of the Act of 1883, the award of damages was greatly increased. The court construed the Act of 1883 as giving the Shoshones "the beneficial right to all net proceeds derived from the sales of timber and other products of the reservation" (R. 81; see also R. 79, 87, 88–89). In other words the court held that the Act gave the Shoshones practically a fee

simple title to the reservation. While we believe that this is an erroneous construction of the Act, as hereinafter pointed out, it resulted in an award to the Shoshones of $1.75 an acre or $2,050,597.50 (R. 79), an amount which conceivably could not have been allowed if the court had based its award of damages merely upon a deprivation of the bare right of use and occupancy of the reservation granted to the Shoshones by their treaty. A holding that the taking occurred in 1878, as we contend, would also obviously eliminate the item of damage of $332,475 which the court awarded as for a temporary use and occupancy of the reservation by the Arapahoes during the period between 1878 and 1891 (R. 81–82).

2. If this Court should be of the opinion that the taking occurred in 1891, as decided below, we submit that the Court of Claims misconstrued the Act of March 3, 1883, when it held that that Act conferred upon the Shoshones the beneficial ownership of the timber, oil, gas, etc., located within the reservation and, therefore, took into consideration these elements of value in awarding damages for the taking instead of confining itself to an ascertainment of the value of the only right guaranteed by the Treaty of 1868 of which the Shoshones were deprived, that is, the right to the exclusive use and occupancy of their reservation.

The Act of 1883 did not enhance or enlarge in any degree the ordinary Indian title of right of use and occupancy vested in the Shoshones by the

Treaty of 1868. It merely gave the Indians a prospective interest, as a gratuity, in the proceeds of the sale of the products referred to therein. It was not a recognition of any right of ownership of the Indians in or to any of such products, nor did Congress thereby convey or yield any right, title, or interest theretofore possessed by the United States, as the owner of the fee simple title to the reservation lands, in or to any of such products. To become operative, and for the Indians to receive any benefit under the Act, the removal and sale of the timber, oil, and other products covered by the Act became necessary. The Act did not authorize any such removal or sale. It merely directed the disposition of moneys derived from the sale of the timber and other products of the reservation after they had been severed from the soil under proper authority. As long as the property was attached to the soil, the Act had no effect. The timber and other products could not be severed from the soil without direct congressional authority. Until Congress gave authority for the removal and sale of the natural products of the reservation, they remained the property of the United States, subject to its right of removal and sale or other disposition. The court below points to no congressional authorization for the removal and sale of the products of the reservation prior to August 13, 1891, the date as of which it based the value of the interest taken. It follows, there-

fore, that the Act of 1883, standing by itself and in the absence of other legislation, gave the Shoshones no greater right in the timber, minerals, and other products of the reservation than they had under the Treaty of 1868. This right was only such right as was incident to the mere use and occupancy of the reservation by the Shoshones. In *United States* v. *Cook*, 19 Wall. 591 (decided at the October Term, 1873), this Court held that timber on an Indian reservation, the lands of which were held by a tribe under the usual Indian title of occupancy alone, as in the instant case, could be used by the tribe for that purpose only; that "If the timber should be severed for the purposes of sale alone—in other words, if the cutting of the timber was the principal thing and not the incident—then the cutting would be wrongful, and the timber, when cut, became the absolute property of the United States" (pp. 593–594); and that "What a tenant for life may do upon the lands of a remainder-man the Indians may do upon their reservations, but no more" (p. 594). A similar ruling was made in 1888 by the Attorney General in an opinion to the Secretary of the Interior on the question whether Indians occupying reservations, the fees to which were in the United States, had the right, in view of the *Cook* decision, to cut and sell for their use and benefit the dead timber, standing or down (19 Op. A. G. 194).

To remedy this situation, so far as dead timber, standing or fallen, was concerned, the Act of February 16, 1889, c. 172, 25 Stat. 673, was passed. This Act provided that the President might from year to year in his discretion, under such regulations as he might prescribe, authorize the Indians residing on reservations or allotments, the fees to which remained in the United States, to fell, cut, remove, sell, or to otherwise dispose of the dead timber, standing or fallen, on such reservation or allotment, for the sole benefit of the Indian or Indians performing the labor. This Act, it will be observed, did not authorize the utilization of the proceeds of sale for the benefit of the tribe as a whole. It was a consent by the Government, the remainderman, that individual members of the life tenant (the tribe) might remove and sell the dead timber, notwithstanding such removal would otherwise result in waste. It was, moreover, a clear recognition of the principle that in the absence of specific congressional authorization an Indian tribe having only the bare right of use and occupancy of a reservation is not entitled to sever and dispose of the timber and other natural products of the reservation except as this may be incident to the right of use and occupation. Obviously, this Act is a direct refutation of the theory held by the court below that the Act of 1883 vested ownership in the tribe, as Congress could not legally give to an indi-

vidual of a tribe proceeds of property which belonged to the whole tribe.

Furthermore, in the case of *Pine River Logging Co.* v. *United States,* 186 U. S. 279, which was decided in 1902, more than nineteen years after the approval of the Act of 1883, and which involved contracts for the removal and sale of dead timber executed pursuant to the Act of 1889, *supra,* this Court, following the principle announced in the *Cook* case, held that "the Indians had no right to the timber upon this land other than to provide themselves with the necessary wood for their individual use, or to improve their land * * * *except so far as Congress chose to extend such right* * * *" (P. 290). [Italics ours.] While no reference is made in the decision to the Act of 1883, it is difficult to believe, if the construction of the Act given by the court below be correct, that an Act having such material bearing on the litigation would have escaped the attention of both court and counsel.

The question whether the Act of 1883 changed the character of an Indian tribe's title to a reservation is obviously one of great importance, as it seriously affects the measure of damages in pending and future cases for any taking by the Government of land in an Indian reservation which occurred after the passage of the Act on March 3, 1883. The question was passed upon by the Court of Claims for the first time in this case and it seems

never heretofore to have been directly presented to this Court.

WHEREFORE, it is respectfully submitted that this petition for writ of certiorari should be granted.

STANLEY REED,
Solicitor General.

SEPTEMBER 1936.

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Supreme Court of the United States

OCTOBER TERM, 1936

No. 216

SHOSHONE TRIBE OF INDIANS OF THE WIND RIVER RESERVATION IN WYOMING,
Petitioner,

vs.

THE UNITED STATES.

BRIEF FOR PETITIONER

No. 328

THE UNITED STATES,
Petitioner,

vs.

SHOSHONE TRIBE OF INDIANS OF THE WIND RIVER RESERVATION IN WYOMING.

RESPONDENT'S ANSWER BRIEF

GEORGE M. TUNISON,
Counsel for Petitioner,
Shoshone Tribe of Indians.

CHARLES J. KAPPLER,
ALBERT W. JEFFERIS,
FRANCIS S. HOWELL,
Of Counsel.

COCKLE PRINTING CO., LAW BRIEFS, OMAHA

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THE UNITED STATES.

—o—

BRIEF FOR PETITIONER

—o—

OPINION BELOW

The opinion of the Court of Claims together with its special findings of fact and conclusion of law are in the printed record beginning at page 30. The opinion is not yet officially reported.

—o—

JURISDICTION

The jurisdiction of the Court is invoked under Section 3 (b) of the Act of February 13, 1925; Title 28, Section 288, Subsection (b) U. S. Code Annotated.

Jurisdiction is also invoked under the provisions of the Jurisdictional Act under which this suit was brought, printed in full in the Amended Petition (R. 1-3), which Act provides:

> "That jurisdiction be, and is hereby, conferred upon the Court of Claims, with right of appeal to the Supreme Court of the United States by either party, * * *."

The case was decided December 2, 1935 (R. 30). Motions for new trial were overruled in a Memorandum and Order June 1, 1936 (R. 98).

STATEMENT OF THE CASE

The Shoshone Indians have ever been friendly to the citizens and loyal to the Government of the United States (Finding 4, R. 36). They have been deprived of the use of, and finally of the title to, an undivided half of their Treaty Reservation, unlawfully and without compensation. The findings and opinion of the Court of Claims recognize and establish the wrong done the Shoshones. But it is believed that the legal conclusions drawn by the Court from the facts found have resulted in an entirely inadequate award of compensation.

Prior to 1868 the Shoshone Tribe held under Treaty (18 Stat. 685, 2 Kappler, 848), 44,672,000 acres of land in Colorado, Utah, Idaho and Wyoming. Their title was not disputed (Finding 1, R. 31).

Upon the close of the Civil War the transcontinental railroads, authorized by act of Congress, were in course of construction from the Missouri River westward to the Pacific. They were obliged to cross vast tracts in possession of Indian tribes, one of such tracts being the above-mentioned Shoshone Treaty lands. To meet this situation Congress enacted the Indian Peace Commission Act of July 20, 1867 (15 Stat. 17). It was necessary under the land-grant to the Union Pacific Railroad to clear title to a strip of land through the heart of the Shoshone domain 40 miles wide and over 400 miles long. The Peace Commission met with the Shoshones at Fort

Bridger. By the Treaty of July 3, 1868 (15 Stat. 673, 2 Kappler, 1020), upon which this suit is based, the Shoshones relinquished the vast domain theretofore held by them and accepted in lieu thereof the reservation involved in this cause. The reservation contained originally 3,054,182 acres and comprises the fairest and best watered portion of the State of Wyoming (Finding 5, R. 38). The Treaty contains the following provisions (Finding 2, pp. 33, 36):

> "ARTICLE 2. * * * The United States further agrees that the following districts of country, to wit: * * * (describing boundaries) * * * shall be and the same is set apart for the absolute and undisturbed use and occupation of the Shoshone Indians herein named, and for such other friendly tribes or individual Indians as from time to time they may be willing, with consent of the United States, to admit amongst them; and the United States now solemnly agrees that no persons except those herein designated and authorized so to do, and except such officers, agents, and employes of the Government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the territory described in this article for the use of said Indians, and henceforth they will and do hereby relinquish all title, claims, or rights in and to any portion of the territory of the United States except such as is embraced within the limits aforesaid."

(NOTE.—This language did not include the Arapahoe Indians.)

> "ARTICLE 11. No treaty for the cession of any portion of the reservation herein described which may be held in common shall be of any force or validity as against the said Indians, unless executed and signed by at least a majority of all adult male Indians occupying or interested in the same; * * *

Provisions substantially identical with the foregoing appear in all of the great treaties made by the Indian Peace Commission (Opinion., R. 70).

The Shoshone Tribe promptly thereafter located upon this reservation and has ever since remained thereon and kept and observed all of the provisions of said treaty (Finding 6, R. 40).

In the winter of 1877-1878, the Northern Arapahoe Indians, who had been at war with the Government of the United States, were brought from western Nebraska, under military escort, to and upon the Shoshone Reservation under the promise of the Indian Office officials that they would be removed therefrom the following year and located upon a reservation of their own at a place in Wyoming called Red Buttes near the mouth of the Sweetwater River (Finding 10, R. 43). They were never removed (Finding 10, R. 50). The Shoshones, from time to time, protested vigorously and appropriately against the presence of the intruders on their reservation and demanded their removal (Finding 10, R. 50). Their protests were ignored by officials of the Indian Office, and on August 13, 1891, the Commissioner of Indian Affairs, in writing, advised that (Finding 11, R. 50):

> "This office holds * * * that the Arapahoes have equal rights to the land on said reservation which does not depend upon the further consent of the Shoshones, * * *"

The above was the only action ever taken by anyone representing the United States with reference to the permanent settlement and location of the Northern Arapahoe band of Indians upon the Shoshone Reservation (Finding 11, R. 50). Thereafter the Shoshones continued

their protests against the presence of the Arapahoes on the reservation and have continued to protest down to the present date (Finding 10, R. 45, 48, 49, 50; Finding 11, R. 50; Findings 14-15, R. 53; Opin., R. 73).

The Jurisdictional Act of March 3, 1927 (44 Stat. 1349), printed in full in the Amended Petition (R. 1-3), conferred jurisdiction upon the Court of Claims, with right of appeal to the Supreme Court of the United States, notwithstanding lapse of time or statutes of limitation, to hear, examine, adjudicate, and render judgment in any and all legal and equitable claims which the Shoshone Tribe may have against the United States arising under or growing out of the Treaty of July 3, 1868, or any subsequent agreement or act of Congress affecting said tribe. The Act further provided:

> "In reference to all claims which may be the subject matter of the suits herein authorized, the decree of the court shall be in full settlement of all damages, if any, committed by the Government of the United States and shall annul and cancel all claim, right, and title of the said Shoshone Indians in and to such money, lands or other property."

This is the only act ever passed by Congress pertaining to taking of title to the lands in suit (Finding 11, R. 51).

Pursuant to this Statute the Shoshones brought the present suit to recover just compensation for the taking of the temporary use and occupancy of an undivided half of their reservation by the United States for the use of the Arapahoes, and to recover just compensation for the permanent taking of the title to an undivided half interest in said reservation by the United States for the benefit of itself and the Arapahoe Tribe.

The Court of Claims held that the matter of permanent location of the Arapahoes upon the Shoshone Reservation had never been presented to the Shoshones (Finding 10, R. 48); that the Shoshones had never consented to the permanent location of the Arapahoes upon the Shoshone Reservation (Finding 10, R. 45); that there had been a use and a taking of an undivided half interest in the Shoshone's Reservation by the United States and that the permanent taking was effectuated by the 1891 letter of the Commissioner of Indian Affairs (Finding 11, R. 50; Opin., R. 78). The Court allowed the Shoshones at the rate of $1.75 per acre for an undivided half interest in the 2,343,540 acres comprising the reservation in 1891, amounting to $2,050,597.50 (Finding 16, R. 53; Opin., 78-79). The Court also allowed for the use and occupancy of said undivided half from 1878 to 1891, by approximately 1,000 Arapahoe Indians, at the rate of $25.00 per Indian per year, amounting to $332,475 (Finding 16, R. 53); Opin., R. 82). The Court made other minor allowances making the total which it found the plaintiff entitled to recover, $2,483,467.99 (R. 68).

Against the above recovery the Court awarded the United States on its counterclaim for gratuities, $1,689,646.50 (R. 68).

The Court adjudged that the plaintiff recover from the United States the difference between the above amounts, viz., $793,821.49 (R. 68).

SUMMARY OF QUESTIONS PRESENTED

1. The Court of Claims held that the letter of the Commissioner of Indian Affairs of August 13, 1891, constituted a permanent taking of an undivided half interest in the Shoshone's Treaty Reservation. Petitioner contends that an interest in the Shoshone's Reservation could be acquired only:

   1. In the manner provided by Article 11 of the Treaty, viz., by signature of a majority of the adult males; or

   2. As provided in Section 2116, R. S.

2. Petitioner submits that the compensation allowed by the Court of Claims for temporary use and occupation of an undivided half interest in the Shoshone Treaty Reservation from 1878 until the permanent taking of said undivided half interest, viz., $25,000 per year is, as a matter of law, inadequate. The Court found the value of the undivided half interest in 1891 to be a little over $2,050,000. A return of 4% per annum on this amount would be $82,000 per year, which is the minimum to which, in view of the Court's findings as to the desirability of the Shoshone Reservation as a place for the Government to keep the Arapahoes, the Shoshones should be entitled. The Court of Claims allowed nothing by way of addition to the value of the use taken, at the time of taking, to produce the present full equivalent of that value paid contemporaneously. Just compensation for taking use of property is not rendered by paying, many years after the use, merely the value of the use at the time of taking.

3. The Jurisdictional Act provides that the judgment shall extinguish the title of the Shoshones to the property

taken. This is the first and only declaration by Congress, or by any one authorized to represent the United States, of an intent to take permanently an interest in the Shoshone's Reservation. Petitioner contends that the taking of the title to an undivided half interest in their Treaty Reservation occurred upon the passage of the Jurisdictional Act of 1927 and the bringing of this suit thereunder and that the value should be fixed as of 1927, together with interest thereon from that date as a part of just compensation.

4. However, should this Court conclude that the permanent taking of the undivided half of the reservation was accomplished by the Commissioner's letter of 1891, then, and in that event, there should be added to the value so found such sum as will produce the present full equivalent of that value paid contemporaneously. Interest at a reasonable rate is a proper and convenient method of ascertaining the amount to be added.

The Order of the Court of Claims of June 1, 1936, overruling the motions for new trial, both of petitioner and of the United States, states (R. 99):

> "If, under all of the facts and circumstances as disclosed by the record and the history of this case from 1878, when the Arapahoes were brought to and placed upon the Shoshone Reservation over the objection of plaintiff, any wrong or injustice has been done in the disposition that the court has made of the matter, it was against the plaintiff in the conclusion that the Shoshone property was actually and legally taken in 1891 instead of 1927, in the value given to the Shoshones for the property taken from them, and in not allowing interest as a part of the measure of compensation.
> * * *
>
> "If the court had been dealing with similar questions between private parties or between the Govern-

ment and a citizen, conclusions more favorable to the plaintiff as to the date of taking and the matter of interest probably would have been compelled by the facts and circumstances."

———o———

SPECIFICATION OF ERRORS

I.

The Court erred in holding as a matter of law, in substance and effect, that an undivided half interest in the Shoshone's Treaty Reservation was permanently taken from the Shoshone Tribe by the United States on August 13, 1891, by virtue of the letter and holding of the Commissioner of Indian Affairs of said date, in which the Commissioner stated (Finding 11, R. 50; Opin., R. 78):

> "This office holds * * * that the Arapahoes have equal rights to the land on said Reservation which does not depend upon the further consent of the Shoshones, and you should conduct your negotiations with them upon that basis and with that understanding."

Authorities.

Article 11 Shoshone Treaty, July 3, 1868, 15 Stat. 675;
Revised Statutes U. S. Sec. 2116; 25 U. S. C. A. Sec. 117;
Lane, Secretary of Interior v. Pueblo of Santa Rosa, 249 U. S. 110, 113;
Borax Consolidated v. Los Angeles, 296 U. S. 10;
Leecy v. United States, C. C. A., 8th Circuit, 190 Fed. 289. Appeal dismissed, 232 U. S. 731;
United States v. Creek Nation, 295 U. S. 103;
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United States v. Carpenter, 111 U. S. 347;
Leavenworth, et al. R. R. Co. v. United States, 92 U. S. 733.

II.

The Court erred as a matter of law in not holding that the permanent taking of the Arapahoe allotments and the undivided half interest in the tribal lands of the Shoshone's Reservation occurred in 1927 upon the passage of the Jurisdictional Act herein and the filing of this suit by the Shoshone Tribe under said Act.

Same authorities as Number I.

III.

The Court erred in holding, as a matter of law, that the statute, 25 U. S. Code Annotated, Indians, Sec. 2, charging the Commissioner of Indian Affairs with the duty to manage all Indian Affairs, conferred power on said Commissioner to hold that the Arapahoes had equal rights to the land of the Shoshone's Treaty Reservation (Opin., R. 76-78); the duty to manage not being equivalent to authority to alienate the corpus of the Shoshone's property.

Same authorities as Number I.

IV.

The Court erred in holding as a matter of law, in substance and effect (Opin., R. 76-78), that the statute, Sec. 2, Title 25, U. S. Code Annotated, imposing upon the Commissioner of Indian Affairs the management of all Indian Affairs, and designating him as the duly authorized officer to represent the United States in matters arising out of Indian relations, conferred power on such Commissioner to alienate any interest in the Shoshone's Treaty lands in violation of the express provision of a later statute (R. S., Sec. 2116; Sec. 177, Title 25, U. S. C. A.) reading as follows:

"SEC. 177. No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution."

Same authorities as Number I.

V.

The Court erred in holding as a matter of law, in substance and effect (Opin., R. 76-78), that the statute, Sec. 2, Title 25, U. S. Code Annotated, imposing upon the Commissioner of Indian Affairs the management of all Indian Affairs, and designating him as the duly authorized officer to represent the United States in matters arising out of Indian relations, conferred power upon said Commissioner to violate and nullify Article Eleven of the Shoshone's 1868 Treaty, reading as follows:

"ARTICLE 11. No treaty for the cession of any portion of the reservations herein described which may be held in common shall be of any force or validity as against the said Indians, unless executed and signed by at least a majority of all the adult male Indians occupying or interested in the same;"

Same authorities as Number 1.

VI.

The Court erred in holding as a matter of law, in substance and effect, that the Commissioner of Indian Affairs had the right and power to determine that the Arapahoes had any rights to the land embraced within the Shoshone Treaty Reservation, in violation of the statutes of the United States relating to disposal of any interest in Indian Tribal Lands, under the findings of the Court of Claims that the Shoshone Tribe never consented to admit the

Arapahoes amongst them on said Reservation as permanent occupants and that no legal consent, agreement, or contract, had ever been entered into between the Shoshone Tribe and the Arapahoe Tribe or the United States whereby the Shoshones surrendered any rights in and to said Reservation to the Arapahoes (Finding 10, R. 45, 48; Opin., R. 70).

Same authorities as Number I.

VII.

The Court erred as a matter of law, in allowing the Shoshones compensation, wholly inadequate, for the temporary use and occupancy of the Reservation by the Arapahoes equally with the Shoshones and for the benefit and profit of the United States (Opin., R. 80-81), for only the period 1878 to 1891; the Court should have allowed the Shoshones compensation based on commercial value and profit to the United States and to the Arapahoes for such temporary use and occupancy for the additional period 1891 to 1927, together with such additions thereto as may be required to produce the present full equivalent of such compensation paid contemporaneously with said temporary use and occupancy. Interest at a reasonable rate is a suitable measure by which to ascertain the amount which should have been added (Finding 16, R. 53).

Authorities.

Johnson v. United States, 2 Ct. Cl. 391;
Johnson v. United States, 4 Ct. Cl. 248;
Pope v. United States, 26 Ct. Cl. 11;
Waite v. United States, 282 U. S. 508;
Phelps v. United States, 274 U. S. 341;

Jacobs v. United States, 290 U. S. 13;
Tiaco v. Forbes, 228 U. S. 549;
United States v. Steamer Nuestra Senora De Regla, 108 U. S. 92;
Dona Maria Francisca O'Reilly de Camara v. Brooke, 209 U. S. 45.

VIII.

The Court erred in holding as a matter of law, in substance and effect, that the only effect of the Jurisdictional Act was to ratify a permanent taking in 1891 of an undivided half interest in the Shoshone Treaty Reservation (Opin., R. 77-78), when in law said Act, First, permitted the recovery of damages, if any, for the temporary use of an undivided half of said Reservation from 1878 to 1927 as under an implied lease; and, Second, provided that the decree of the Court should permanently take and cancel the Shoshone's treaty title to the Arapahoe allotments and to an undivided half interest in the unallotted tribal lands, both provisions necessarily implying the constitutional right to just compensation.

Authorities.

Johnson v. United States, 2 Ct. Cl. 391;
Johnson v. United States, 4 Ct. Cl. 248;
Pope v. United States, 26 Ct. Cl. 11;
International Paper Co. v. United States, 282 U. S. 399;
Crozier v. Fried-Krupp, 224 U. S. 290.

IX.

The Court erred as a matter of law in failing to allow the Shoshones the just compensation required by the Fifth Amendment of the Constitution of the United States for the permanent taking of the Arapahoe allotments and the undivided half interest in the tribal lands of

the Shoshone Treaty Reservation, whether same occurred in 1891 or in 1927, in that the Court should have included in the judgment such addition to the value thereof at the time of the permanent taking as may be required to produce the present full equivalent of that value paid contemporaneously with the permanent taking. Interest at a reasonable rate is a suitable measure by which to ascertain the amount which should have been added.

Authorities.

United States v. Creek Nation, 295 U. S. 103;
Jacobs v. United States, 290 U. S. 13;
Seaboard Air Line R. Co. v. United States, 261 U. S. 299, 306;
Phelps v. United States, 274 U. S. 341;
Waite v. United States, 282 U. S. 508;
Yankton Sioux Tribe of Indians v. United States, 272 U. S. 351, 65 Ct. Cls. 428.

SUMMARY OF ARGUMENT

1. The Commissioner of Indian Affairs was without power to take an undivided half interest in the Shoshone's Treaty Reservation for the use of the United States and the Arapahoe Tribe, or to destroy the corpus of the trust estate rather than administer the same.

2. The compensation allowed for the temporary use and occupation of the Shoshone's Reservation is inadequate, both as to time allowed for and amount thereof.

3. The permanent taking of an undivided half interest in the Shoshone's Reservation occurred in 1927 upon the passage of the Jurisdictional Act and the bringing of this suit thereunder, and not otherwise.

4. Just compensation requires that the Shoshones be awarded such sum, in addition to the value of the use, at the time of such use, and in addition to the value of the land at the time of annulling and cancelling the title, as will produce the present full equivalent of those values paid contemporaneously. Interest at a reasonable rate is a proper and convenient method to ascertain the amount to be added.

—o—

ARGUMENT

Assignments of Error I to VI.

The first six assignments of error relate to the legal significance and effect attributed by the Court of Claims in its decision herein, to the letter and holding of the Commissioner of Indian Affairs of August 13, 1891, and to the manner in which Indian titles may be taken. Therefore, these six assignments of error will be considered together:

Following is a pertinent extract from the Special Findings of Fact (Finding 11, R. 50-51):

> "No definite action was ever taken by the officials of the Government with reference to the permanent settlement of the Arapahoes until August 13, 1891. Shortly prior to that date a commission, known as the 'Woodruff Commission,' had been sent to the Shoshone Reservation to negotiate for a cession of such portion of the Reservation as the Indians chose to dispose of. On August 5, 1891, the chairman of the Commission wrote the Commissioner of Indian Affairs asking for instructions as to how the Commission should treat with the Indians, inasmuch as Chief Washakie, and the Shoshones denied that the Arapahoes had any rights to or upon the reservation. He stated that the Shoshones insisted that the Arapahoes

came there merely as temporary visitors; that the claim of the Shoshones to the whole of the reservation was backed by Dr. James Irwin, who was present and discussed the matter of the presence of the Arapahoes with Chief Washakie and the Shoshones shortly before their arrival at the Shoshone Reservation in March, 1878. In reply the Commissioner of Indian Affairs, on August 13, advised the Commissioner that 'this office holds * * * that the Arapahoes have equal rights to the land on the said reservation which does not depend upon the further consent of the Shoshones, and you should conduct your negotiations with them upon that basis and with that understanding.' This is the only action ever taken by anyone representing the United States with reference to the permanent settlement and location of the Northern Arapahoe Band of Indians upon the Shoshone Reservation. Notwithstanding the continued protests of the Shoshones, the Woodruff Commission proceeded to counsel alike with the Shoshone and the Arapahoe Indians. The result of these negotiations will be further referred to hereinafter. The ruling made by the Commissioner of Indian Affairs on August 13, 1891, has ever since been enforced by the Interior Department. No action, except the enactment of the Jurisdictional Act in this case, was ever taken by Congress with reference to the presence of the Arapahoe Indians upon the Shoshone Reservation."

The opinion states (R. 75-76):

"We are of opinion that the Government, through the Commissioner of Indian Affairs, who by statute was charged with the management of all Indian affairs and all matters arising out of Indian relations under direction of the Secretary of the Interior, and agreeable to such regulations as the President might prescribe, took from the plaintiff tribe an undivided one-half interest in all property and property rights to which they were entitled by law for the benefit of the Northern Arapahoe Indians; and that this action

of the Government, acting through the Commissioner of Indian Affairs, occurred on August 13, 1891, when that official definitely held that 'this office holds that the Arapahoes have equal rights to the land on the said reservation which does not depend upon the further consent of the Shoshones' (Finding 11). Prior to that time—that is, from the period March 18, 1878, until August, 1891—the Arapahoes simply resided upon, used, and occupied the reservation equally with the Shoshones as a result of the errors and misunderstandings by the officials charged by law with the management of all Indian affairs as to the willingness and consent of the Shoshones to admit the Arapahoes amongst them, without any definite action having been taken in regard to the matter when the error was first called to the attention of the proper officials."

The opinion states (R. 78):

"For the reasons stated, it is our opinion that an undivided one-half interest in plaintiff's reservation was taken from them for the benefit of the Northern Band of Arapahoes on August 13, 1891, and that the plaintiff tribe is entitled to recover the value of an undivided one-half interest in the reservation on that date."

Petitioner respectfully submits that the Commissioner of Indian Affairs was without authority to divest the Shoshones of lands and rights in the reservation held by them under their Treaty of 1868. The opinion holds (R. 76-77), that by Sec. 2, U. S. Code Annotated, Title 25, the Commissioner of Indian Affairs, the official directly charged with the administration and management of all Indian affairs, is vested with authority and jurisdiction by writing a letter to take from the Shoshones their land and Treaty rights. It should be borne in mind that Sec. 2 of Title 25 giving the Commissioner of Indian Affairs

the management of all Indian affairs, was the act of July 9, 1832 (4 Stat. 564). In 1834 Congress enacted R. S., Sec. 2116; Sec. 177, 25 U. S. Code Annotated, as follows:

> "No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution."

In 1868 the Shoshone Treaty was made and was later duly ratified and proclaimed and became supreme law of the land. It provided, with respect to the lands on the Shoshone Reservation (Finding 2, R. 36):

> "ARTICLE 11. No treaty for the cession of any portion of the reservations herein described which may be held in common shall be of any force or validity as against the said Indians, unless executed and signed by at least a majority of all the adult male Indians occupying or interested in same."

The Shoshone Treaty also provided, Art. 2, that any other tribes which the Shoshones might be willing to admit amongst them could only be admitted "with the consent of the United States" (Finding 2, R. 33). Such consent could be given only by Congress.

It is respectfully submitted that the power and jurisdiction attributed to the Commissioner of Indian Affairs in the Court's decision herein is without support in, and is contrary to, the authorities.

> *Leecy v. United States*, C. C. A., 8th Circuit, 190 Fed. 289. Appeal dismissed on motion of Solicitor General, 232 U. S. 731.

Complainant, a Chippewa Indian, was entitled under Act of Congress to an allotment of land on the White

Earth reservation. She selected and applied for a certain 80 acre tract chiefly valuable for pine timber growing thereon. The United States Indian Agent on the reservation had set the land apart as a sawmill reserve for general reservation purposes and for lumber to build houses for the Indians. The agent's action was approved by the Secretary of the Interior. The court said:

> "There is only one question in this case, and that is: Did the Indian agent or the Secretary of the Interior have any rightful authority to withdraw the land in question from allotment for the purposes set up in the answer. * * *
>
> "Section 441, Revised Statutes (U. S. Comp. St. 1901, p. 252):
>
> "'The Secretary of the Interior is charged with the supervision of public business relating to the following subjects: * * * Third—The Indians.'
>
> "Section 463, Revised Statutes (U. S. Comp. St. 1901, p. 262):
>
> "'The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeable to such regulations as the President may prescribe, have the management of all Indian affairs, and of all matters arising out of Indian relations.'
>
> "None of these provisions conferred the power claimed. * * *
>
> "Congress authorized the allotment of these lands, and if the Secretary of the Interior could under his authority withdraw a portion of them from allotment he could withdraw substantially all of them, if that seemed in his judgment best, and under the contention of the government he would be executing an allotment law under rules and regulations prescribed, when in fact he nullified the law by withdrawing the very lands from allotment which Congress had authorized to be so distributed. The law was to be

executed under, not nullified by, rules and regulations."

"A strong argument is made tending to show that power should be vested in the President or some other officer of the government to withhold from allotment lands specially needed for use of the tribe as a whole, but such arguments should be addressed to Congress rather than to the courts. If such a law would be wise, that is no reason why an executive department should make one, or the courts sustain it in doing so."

United States v. Creek Nation, 295 U. S. 103.

"But this power to control and manage was not absolute. While extending to all appropriate measures for protecting and advancing the tribe, it was subject to limitations inhering in such a guardianship and to pertinent constitutional restrictions. It did not enable the United States to give the tribal lands to others, or to appropriate them to its own purposes, without rendering, or assuming an obligation to render, just compensation for them; for that 'would not be an exercise of guardianship, but an act of confiscation.' Lane v. Santa Rosa, 249 U. S. 110, 113; Cherokee Nation v. Hitchcock, 187 U. S. 294, 307, 308."

* * *

Borax Consolidated v. City of Los Angeles, 296 U. S. 10.

" 'Of course,' said the Court in St. Louis Smelting & Ref. Co. v. Kemp, 104 U. S. 636, 641 26 L. Ed. 875, 876, 'when we speak of the conclusive presumptions attending a patent for lands, we assume that it was issued in a case where the department had jurisdiction to act and execute it; that is to say, in a case where the lands belonged to the United States, and provision had been made by law for their sale. If they never were public property, or had previously been disposed of, or if Congress had made no provision for their sale, or had reserved them, the department would have no jurisdiction to transfer

them, and its attempted conveyance of them would be inoperative and void, no matter with what seeming regularity the forms of law may have been observed.' * * *

'Here, the question goes to the existence of the subject upon which the Land Department was competent to act. Was it upland, which the United States could patent, or tideland, which it could not? Such a controversy as to title is appropriately one for judicial decision upon evidence, and we find no ground for the conclusion that it has been committed to the determination of administrative officers."

United States v. Carpenter, 111 U. S. 347.

"Syl. 1: Where land is reserved for the use of an Indian Tribe by treaty, it cannot be taken up, either by settlement or by location, under the Louisiana Agricultural College scrip."

"Syl. 2. The treaty is notice that the land will be retained by the Government for the use of the Indians, and this purpose cannot be defeated by the action of any officers of the land department."

Lane, Secretary of the Interior, v. Pueblo of Santa Rosa, 249 U. S. 110, 113.

"The defendants assert with much earnestness that the Indians of this pueblo are wards of the United States,—recognized as such by the legislative and executive departments,—and that in consequence the disposal of their lands is not within their own control, but subject to such regulations as Congress may prescribe for their benefit and protection. Assuming, without so deciding that this is all true, we think it has no real bearing on the point we are considering. Certainly it would not justify the defendant in treating the lands of these Indians—to which, according to the bill, they have a complete and perfect title—as public lands of the United States, and disposing of the same under the Public Land Laws. That would not be an exercise of guardianship, but an act of confisca-

tion. Besides, the Indians are not here seeking to establish any power or capacity in themselves to dispose of the lands, but only to prevent a threatened disposal by administrative officers in disregard of their full ownership."

Pueblo of Santa Rosa v. Fall, 273 U. S. 315, 320-1.

In this case the Court held that a deed to lands belonging to an Indian village, executed by the captain of the village, was void because not executed as required by the Statute.

"Section 2116 declares that no 'conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. These sections apply here whether the Indians concerned are to be classified as nomadic or Pueblo Indians. United States v. Candelaria, 271 U. S. 432, 441, 442. None of their requirements can be dispensed with and it does not appear that in respect of most of them there was even an attempt to comply. See and compare, Green v. Menominee Tribe, 233 U. S. 558, 568; Lease of Indian Lands for Grazing Purposes, 18 Ops. Atty. Gen. 497. * * * "

18 *Opinions Attorney General,* 235-237 (Mr. Garland).

"'This statutory provision (R. S. 2116) is very general and comprehensive. Its operation does not depend upon the nature or extent of the title to the land which the tribe or nation may hold. Whether such title be a fee simple, or a right of occupancy merely, is not material; in either case the statute applies. It is not, therefore, deemed necessary or important, in connection with the subject under consideration, to inquire into the particular right or title to the above mentioned reservations held by the Indian tribes or nations respectively which claim them. Whatever the right or title may be, each of

> these tribes or nations is precluded, by the force and effect of the statute, from either alienating or leasing any part of its reservation, or imparting any interest or claim in or to the same, without the consent of the Government of the United States. * * * '
>
> "'I submit that the power of the Department to authorize such leases to be made, or that of the President or Secretary to approve or to make the same, if it exists at all must rest upon some law, and therefore be derived from either a treaty or a statutory provision.'"

In 1896 Petitioner Indians ceded to the United States a tract of land in the northeast corner of the Reservation. Over the protest of the Shoshones the Arapahoes were permitted to participate in the council and to join in the cession agreement on condition that a provision protecting the Shoshone's treaty rights be inserted therein (Finding 14, R. 52). This agreement was ratified by Congress on June 7, 1897 (30 Stat. 62). Again in 1904 there was a cession of a portion of the Reservation and the representative of the United States met the same situation respecting the objections of the Shoshones to the presence of the Arapahoes and overcame same by inserting in the agreement a provision protecting the Shoshone's treaty rights. This agreement was approved by Congress March 3, 1905 (33 Stat. 1016) (Finding 15, R. 53).

From these findings by the Court it is manifest that Congress in 1897 and in 1905, by enacting the appropriate reservations in each of said agreements, adhered to and preserved for the Shoshones all benefits to which they were entitled under their 1868 treaty stipulations. These acts of Congress were, respectively, six and fourteen years subsequent to the Commissioner's letter of 1891. The 1891 letter did not deter Congress from honoring and adhering

to its solemn treaty stipulations and Congress continued so to do by the Jurisdictional Act of March 3, 1927, wherein it provided the manner and the method to acquire the title to an undivided half interest in the Shoshone's treaty reservation.

It is submitted that the foregoing authorities amply sustain the first six assignments of error. The "holding" of the Commissioner of Indian Affairs of August 13, 1891, was void and of no legal efficacy so far as concerned a permanent taking of any interest in the Shoshone Treaty Reservation lands. And that holding did not increase in legal power and efficacy with the passing years. It was just as void in 1927, when Congress enacted the Jurisdictional Act, providing for the cancellation of the Shoshone title by a suit under said act, as it was in 1891. The Act of 1927 and this suit thereunder passed the title.

Assignment of Error VII.

Accepting the authorities and law as to assignments of Error I to VI, viz., that there was no permanent taking until 1927, then it follows that assignment VII should be sustained, viz., compensation should be allowed for temporary use and occupancy from 1878 to 1927, instead of only from 1878 to 1891.

Johnson v. United States, 2 Ct. Cl. 391.

Syl. VI. "The rule for the measure of damages for the temporary occupation of lands by the government is the value of such temporary occupancy at the time of entry, as though the claimant had leased and the government had rented the premises, regard being paid to the nature of the occupancy and to the fact that the government has the option of discontinuing the implied tenancy on any day or of con-

tinuing it indefinitely" (Cited with approval, 261 Fed. 690).

Johnson v. United States, 4 Ct. Cl. 248.

"Ejectment * * * does not lie against the Government. * * *

"But when, in an action in the nature of ejectment, the claimant's 'right of property' is established, the Government will be deemed to have entered as his tenant under an implied lease, whereof the 'just compensation' secured by the Constitution to those whose property is taken for the public use is the rent. * * *

"When the Government has entered upon land, and holds under an implied lease, the measure of the damages must be limited to the value of the occupancy, as though the claimant had leased and the Government had rented the premises, regard being paid to the nature of the occupancy and to the fact that the Government holds the option of discontinuing the implied tenancy at any time or continuing it indefinitely."

See also *Pope v. United States,* 26 Ct. Cl. 11.

It is further submitted that under the findings of the Court the award for temporary use and occupation is inadequate. In finding 16, R. 53, the value in 1891 of the undivided half interest in the reservation used by the Arapahoes is fixed at $2,050,597.50. For the use of this property the Shoshones are awarded $25,575 annually, which is at the rate of about 1¼% per annum of the value of the property use. The current, legal interest rate in Wyoming has never been less than 7%. An interest rate of only 4% annually on $2,050,000 would give an annual return of $82,000. For only the thirteen years mentioned in the findings this amounts to $1,066,000 instead of $332,475.

The Court, Opin., R. 81-82, holds that the Shoshones are entitled to damages for use and occupation of their reservation by the Arapahoes and that a reasonable allowance

for such use and occupation is the sum of $25.00 per year for each Arapahoe. $25.00 per year per Indian is less than seven (7) cents a day for untrammeled use and occupation of over 2,000,000 acres of land, containing unlimited resources. Attention is especially directed to the vivid description of this beautiful country, the home of the Shoshones, appearing in the Court's finding 5, R. 38-40. A few excerpts therefrom follow:

> "The plaintiff's reservation, set apart by the treaty of July 3, 1868, is located in the central-western part of Wyoming. * * * The reservation is protected from the elements by these two ranges of mountains; also by the Beaver Divide to the south. The ancient Indian name for the reservation is Warm Valley.
>
> "The reservation comprises the fairest and best-watered portion of the State of Wyoming. The character of the land ranges from precipitous mountains at the extreme north and west, down through heavily timbered upland, lower down through well-grassed bench land, to a series of river valleys with level, deep soil toward the eastern portion of the reservation * * * numerous fresh-water lakes well stocked with trout and waterfowl, and on whose banks live beaver, otter and other fur-bearing animals. The mountains contain more than 400,000 acres of spruce, pinon, hemlock, balsam, and yellow and white pine timber. The river valleys are level, easily irrigated, several miles in width, and contain a warm, rich, and productive soil. Stock lives the year around without other feed than being herded on the grasses growing from the mountain tops to the lowest valleys in greatest abundance, affording ample feed and range for livestock in the mountains in the summer season, and in the lower reaches of the reservation in the fall and winter seasons. The water is pure and the climate is mild and regular. The soil is rich and compares favorably in fertility to that of Illinois and Iowa. * * *

"The soil and climatic conditions on the reservation are well suited for the production of alfalfa, sweet clover, hard and soft wheat, oats, barley, corn, beans, peas, tomatoes, sugar beets, garden vegetables, small fruits and melons. The land has a high average yield of crops.

"The reservation contained substantial deposits of coal, oil, gas, gypsum and minerals. * * *

"The land on the reservation best suited for agricultural purposes lies toward the eastern portion thereof where the river valleys are wider, the soil deeper, and free from boulders, easy to irrigate, and nearer a railroad, and due to elevation, the growing season is from three to four weeks longer in the eastern portion of the reservation than in the western portion. The Arapahoes were placed on the eastern portion of the reservation. * * * Ample water is available to irrigate all agricultural land on the reservation. The reservation is supplied with sufficient water power for the production of water, electric light and power.

"At the time of the execution of the treaty of July 3, 1868, buffalo, elk, bear, antelope, deer and other wild animals suitable for food, were in great abundance on the reservation. Such game was native and indigenous to the mountains and valleys of the reservation and was found sufficiently adequate for subsistence of the Indians for many years. The plaintiff tribe of Indians went on annual hunts into the mountains for food, and the skins of certain wild animals were used for robes and other necessary uses for members of the tribe."

In the opinion (R. 79), the Court stated:

"It (Reservation) contained a large but undetermined quantity of oil and gas. * * * The oil and gas reserves alone were of great value in 1891. The Government for the purpose of this suit, fixed the 1926 present value of these reserves at $6,000,000."

At R. 82, the Court further stated:

> "After they (Arapahoes) were placed upon the Shoshone Reservation in 1878, they used the same equally with the Shoshones by hunting, farming, pasturing their stock, building houses and fences, and sharing in the facilities of the agency and the employees provided by the Government for the Shoshone tribe" (Finding 10, R. 50).

From the Court's description above noted, it must be conceded that the Shoshone Reservation was a most desirable country in which to live. It is unbelievable that for the mere pittance of less than seven cents a day allowed by the Court an Arapahoe Indian could have obtained anywhere in the United States the right and privilege to live on and roam over a tract of country, embracing over 2,000,000 acres, so generally desirable as is described above; to hunt in the mountains and fish in the streams to his heart's content; farm the land; pasture horses and cattle; cut timber for fires, homes, fences, corrals and teepee poles; cut and sell wood and hay to a Government military post (Finding 18, R. 54); obtain oil and coal for light and heat; gather fruits, berries, nuts, herbs, and vegetables; procure all the buffalo meat he could eat and sell what he could not dispose of; use or sell the hides, skins, robes and horns; shoot all kinds of small game and share in the plentiful supply of antelope, deer, elk, bear, and other game animals and use the pelts, furs and skins for clothing and barter (Finding 5, R. 40). In short, all the wonderful resources of the Shoshone Reservation, affording an Indian subsistence, clothing, shelter and articles for barter, were at his daily disposal with little effort. There were ample resources of all kinds on the reservation—animal, vegetable, and mineral, as

well as materials for shelter, warmth and comfort,—to supply all the requirements of the Indian mode of life and in addition furnish numerous articles of barter which brought cash money.

The Commissioner of Indian Affairs in his Annual Report for 1866, page 118, estimated the needs of the Pyramid Reserve Indians for rations at 40 cents per day each; and in his report for 1869, page 246, he estimated the cost of subsistence of the Mescalero Apache Indians, consisting of full ration of beef and other necessaries, at approximately $60.00 a year per Indian.

The benefit accruing to the United States is an important element in fixing the value of the use and occupation. It largely benefited financially and otherwise by having placed the Arapahoes on the Shoshone Reservation. These Indians had proved a wily and rapacious tribe (Finding 8, R. 41-53; Opin., R. 82). Army officers protested against placing them on the Shoshone Reservation (Finding 10, R. 47). Had the Arapahoes not been placed on the Shoshone Reservation a separate reservation, promised them by treaty, would have been imperative which new reservation would have necessitated agency buildings, warehouses, mills, school houses, farmers, blacksmiths, teachers, physicians and other employes, and also additional appropriations for their support and maintenance (Finding 7, R. 41).

All the above items and the advantages accruing to the United States, it is submitted, should be taken into consideration in fixing a proper allowance for use and occupation. From a commercial standpoint it would have been impossible for a price of less than seven cents a day per

Indian to have obtained the large and varied consideration furnished by the Shoshones to the Arapahoes and the Government; consequently justice requires that an allowance be granted commensurate with the value obtained from the Shoshones and enjoyed by the Arapahoes and the Government.

The Arapahoes had the use of the whole reservation in common with the Shoshones (Finding 10, R. 50), together with all its varied and valuable resources, and in addition thereto the advantages of the administrative, educational, farming, and other facilities provided by the Shoshones (Opin., R. 82).

Present Full Equivalent Should Be Allowed

In addition to proper compensation for the temporary use and occupancy from 1878 to 1927, there should be allowed such further amount as may be required to produce the present full equivalent of such compensation paid contemporaneously.

Phelps v. United States, 274 U. S. 341.

This was a case involving the question of compensation for the use of a pier, the lease on which was owned by plaintiffs. The use of the pier was requisitioned by the Secretary of War in 1917. The Court of Claims allowed compensation for the use, but disallowed the claim for additional amounts claimed as part of just compensation. This court said:

> "Plaintiffs' property was taken before its value was ascertained or paid. Judgment in 1926 for the value of the use of the property in 1918 and 1919, without more, is not sufficient to constitute just compensation. Section 177 does not prohibit the inclusion of the additional amount for which petitioner contends. It is not a claim for interest within the pur-

pose or intention of that section. Acts of Congress are to be construed and applied in harmony with and not to thwart the purpose of the Constitution. The government's obligation is to put the owners in as good position pecuniarily as if the use of their property had not been taken."

In connection with the Phelps case it should be noted that the Secretary of War did not take the title to the pier, nor the title to an undivided half interest thereof. He took merely the *use* of the pier.

Waite v. United States, 282 U. S. 508.

This was a suit to recover for the unlicensed use of a patented invention. The opinion states:

"The statute grants 'recovery of his reasonable and entire compensation for such use.' We are of opinion that interest should be allowed in order to make the compensation 'entire.' In addition to the purpose of the word adverted to in Richmond Screw Anchor Co. v. United States, 275 U. S. 331, 343, we cannot doubt that it was intended to accomplish complete justice as between the plaintiff and the United States."

Jacobs v. United States, 290 U. S. 13.

"The fact that condemnation proceedings were not instituted and that the right was asserted in suits by the owners did not change the essential nature of the claim. *The form of the remedy did not qualify the right.* It rested upon the Fifth Amendment. Statutory recognition was not necessary. A promise to pay was not necessary. Such a promise was implied because of the duty to pay imposed by the Amendment. The suits were thus founded upon the Constitution of the United States. U. S. C. Title 28, Sec. 41 (20). * * * (Italics ours.)

"The owner is not limited to the value of the property at the time of the taking; 'he is entitled to such addition as will produce the full equivalent of that

> value paid contemporaneously with the taking.' Interest at a proper rate 'is a good measure by which to ascertain the amount so to be added.' ''

Petitioner respectfully emphasizes that taking the use of an undivided one-half of the Shoshone Reservation by executive officers and appropriating it to the benefit of the United States and to the unqualified benefit of the Arapahoes, was a taking for public use; and under the ratification by the jurisdictional act of 1927 the case stands as though the United States under its soverign power, from year to year, had taken the use of the property of the Shoshones.

Tiaco v. Forbes, 228 U. S. 549;
United States v. Steamer Nuestra Senora De Regla, 108 U. S. 92;
Dona Maria Francisca O'Reilly de Camara v. Brooke, 209 U. S. 45.

Assignment of Error VIII.

The language of the Jurisdictional Act is clear. It provides, Sec. 3 (R. 3):

> "In reference to all claims which may be the subject matter of the suits herein authorized, the decree of the court shall be in full settlement of all damages, if any, committed by the Government of the United States and shall annul and cancel all claim, right, and title of the said Shoshone Indians in and to such money, lands, or other property."

The foregoing contemplates two things. First, recovery for the damages, if any, for the temporary use of an undivided half of the Shoshones' reservation from 1878 to 1927. That use was an accomplished fact when the Jurisdictional Act was passed. Whether the Commissioner of Indian Affairs had the power and authority to temporar-

ily use the Shoshones' reservation as a home for the wandering Arapahoes, or whether he enforced such temporary use unlawfully, at any rate he had done that very thing. So the fact of the use stood accomplished and Congress authorized suit for damages therefor.

But Congress recognized that whatever claims the Commissioner may have asserted as to permanently taking a half interest in the lands of the reservation were without foundation. He had no such power. Congress also recognized that permanent provision must be made for the Arapahoes, otherwise there would be a constant recurrence of the Shoshones' claim for temporary use and occupation.

Therefore, Congress provided, second:

> * * * "the decree of the court shall * * * annul and cancel all claim, right, and title of the Shoshone Indians in and to such money, lands, or other property."

Unless Congress had recognized the distinction between damages for the temporary use, and compensation for the permanent taking, the words last above quoted are superfluous. Congress knew that nothing the Commissioner had done, or could do, could annul and cancel the Shoshones' Treaty title.

The Court of Claims, in rejecting plaintiff's contention above, states (Opin., R. 78):

> "In *Crozier v. Fried. Krupp Aktiengesellschaft,* 224 U. S. 290, it was held that 'The adoption by the United States of the wrongful act of an officer is of course an adoption of the act when and as committed and causes such act of the officer to be, in virtue of the statute, a rightful appropriation by the Government, for which compensation is provided.' In that

> case the court was construing the act of 1910 authorizing suits against the United States for patent infringement, and the issue involved a patent which had been used without permission of the owner by an officer of the United States prior to the passage of that act."

It is respectfully submitted that the analogy fails. In the *Crozier* case, neither General Crozier nor the Government ever claimed to take title to the Fried. Krupp patent. They simply *used* it, temporarily, in furtherance of the business of the United States, viz., the manufacture of guns, just as the Indian Office *used* the Shoshones' Reservation temporarily in furtherance of the desire and duty to provide facilities for the Arapahoes. There was no attempt to take the title to the patent away from Fried. Krupp. The language of the opinion of this Court is clear. It quotes the Statute, as follows:

> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That whenever an invention described in and covered by a patent of the United States shall hereafter be used by the United States without license of the owner thereof or lawful right to use the same, such owner may recover reasonable compensation for such use by suit in the Court of Claims." * * *

The opinion then continues:

> "The text of this statute leaves no room to doubt that it was adopted in contemplation of the contingency of the assertion by a patentee that rights secured to him by a patent had been invaded for the benefit of the United States by one of its officers; that is, that such officer, under the conditions stated, had infringed a patent."

At numerous other places in the opinion are clear indications that what this Court was considering was only

the *use* of the Fried. Krupp patent, and that the adoption by the United States of General Crozier's *use* was an adoption of such act when and as committed. In the instant case the United States has adopted the act of the Indian Office in *using* the Shoshone Treaty lands. But Congress went a step further and provided for permanently acquiring title thereto.

The Johnson and Pope cases in the Court of Claims, cited *supra* under VII, are clear as to the nature of the temporary use and occupancy of the Shoshone's Reservation up to the date of the Jurisdictional Act and this suit thereunder.

Assignment of Error IX.

Petitioner submits that just compensation includes such addition to the value of the property at the time of the permanent taking as may be required to produce the present full equivalent of that value paid contemporaneously. The *Phelps* and *Jacobs* cases, cited under Assignment VII, *supra,* are conclusive on this point. They are referred to in the foot notes to the recent case of:

United States v. Creek Nation, 295 U. S. 103.

"But the just compensation to be awarded now should not be confined to the value of the lands at the time of the taking but should include such addition thereto as may be required to produce the present full equivalent of that value paid contemporaneously with the taking. Interest at a reasonable rate is a suitable measure by which to ascertain the amount to be added. The treaty of 1866, the act of 1889 and other statutes show that five per cent per annum is a reasonable rate as between the parties here."

The Court of Claims in its order of June 1, 1936 (R. 99), states:

> "If the court had been dealing with similar questions between private parties or between the Government and a citizen, conclusions more favorable to the plaintiff as to the date of taking and the matter of interest probably would have been compelled by the facts and circumstances."

Indians are citizens of the United States, such citizenship having been conferred by the Act of Congress of June 2, 1924 (43 Stat. 253). See 4 Kappler, 1,165.

By the General Allotment Act of Feb. 8, 1887, Sec. 6 (24 Stat. 388), Congress declared that Indians so allotted shall become citizens of the United States and of the State in which they reside.

Indians and Indian tribes come within the protection of the Constitution. In *United States v. Creek Nation, supra,* this Court stated:

> "While extending to all appropriate measures for protecting and advancing the tribe, it was subject to limitations inhering in such a guardianship and to pertinent constitutional restrictions. It did not enable the United States to give tribal lands to others, or to appropriate them to its own purposes, without rendering, or assuming an obligation to render, just compensation for them; for that 'would not be an exercise of guardianship, but an act of confiscation.' Lane v. Pueblo of Santa Rosa, 249 U. S. 110-13; Cherokee Nation v. Hitchcock, 187 U. S. 294, 307-8."

See also *Cherokee Nation v. So. Kans. R. R. Co.,* 135 U. S. 641; *U. S. v. Mille Lac Band of Chippewa Indians,* 229 U. S. 498, holding that property of Indian tribes comes within the rule of just compensation.

It would appear that as guardian of the Indians, both as individuals and as tribes, the United States is more strictly obligated to act justly toward the Indians than in similar cases of whites against the Government where such guardianship does not exist. This thought is cogently expressed by the Supreme Court in *Choctaw Nation v. United States,* 119 U. S. 1:

> "The recognized relation between the parties to this controversy is that between a superior and an inferior, whereby the latter is placed under the care and control of the former, and which, while it authorizes the adoption on the part of the United States of such policy as their own public interests may dictate, recognizes on the other hand such an interpretation of their acts and promises as justice and reason demand in all cases where power is exercised by the strong over those to whom they owe care and protection. The parties are not on an equal footing and that inequality is to be made good by the superior justice which looks only to the substance of the right without regard to technical rules framed under a system of municipal jurisprudence, formulating the rights and obligations of private persons equally subject to the same laws."

The Court of Claims states (R. 78):

> "Moreover, the rules with reference to condemnation proceedings and the taking of private property for public use are not entirely applicable to cases such as the one at bar. The Indian Tribes were under the control, care, and protection of the United States and although they could not legally be deprived of any property secured to them by treaty, agreement or act of Congress, the legal title to lands embraced in reservations set apart for the absolute and undisturbed use and occupancy of Indians remained in the United States."

There is no logical reason to discriminate against Indian tribes as compared with private parties merely on the ground that the naked legal title resides in the United States. It is well known that such legal title was retained solely so that it should not pass into foreign hands. As said by the Supreme Court in *Leavenworth L. & Co. v. United States,* 92 U. S. 733,

> "As long ago as in Cherokee Nation vs. Georgia, 5 Peters 1, this court said that the Indians are acknowledged to have the unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to the Government; and recently, United States v. Cook, 19 Wall. 591, this right of occupancy has been said to be sacred as the title of the United States to the fee. Unless the Indians were deprived of the power of alienation, it is easy to see that they could not peaceably enjoy their possessions with a superior race constantly encroaching on their frontier. * * * This perpetual right of occupancy, with the correlative obligation of the Government to enforce it, negatives the idea that Congress, even in the absence of any positive stipulation to protect the Indians, intended to grant their lands to a railroad company, either absolutely or *cum onere.* For all practical purposes, the Osages owned the lands, as the actual right of possession, the only thing they deemed of value, was secured to them by the treaty of June 2, 1825, until they should elect to surrender it to the United States. In the free exercise of their choice, they might occupy their lands forever, and whatever changed this condition or interfered with it, violated the guarantees under which they had lived since that date."

The cases of the Yankton Sioux Tribes of Indians in the Court of Claims and the Supreme Court of the United States are applicable to the situation here presented.

Yankton Sioux Tribe of Indians v. United States, 61 Ct. Cls. 40.

The Indians sought to recover for the value of the Pipestone Quarries, 648 acres of land in Minnesota, alleging their ownership and claiming that the Government had wrongfully taken the lands. The Court of Claims found that the quarries were and ever had been open to the Indians to procure pipestone; that they had been deprived of no rights, and dismissed the petition. The decision of the Court of Claims was reviewed by the Supreme Court on certiorari in:

Yankton Sioux Tribe of Indians v. United States, 272 U. S. 351.

The Supreme Court reversed the decision of the Court of Claims stating:

> "It is quite clear from all the surrounding circumstances that the Indians understood that by this provision there was granted to them full ownership of the tract; and their claim to that effect they have always persistently and stoutly maintained."

After the reversal the case was disposed of in the Court of Claims in *Yankton Sioux Tribe of Indians v. United States,* 65 Ct. Cls. 428. In the body of the opinion the court recites the history of the case, the previous decision in 61 Ct. Cls. 40, and the reversal of that decision by the Supreme Court, stating:

> "The judgment dismissing the petition was reversed by the United States Supreme Court, 272 U. S. 351, 359, that court holding 'That the United States has taken and holds possession of the entire quarry tract of 648 acres * * * and since the Indians are the owners of it in fee, they are entitled to just compensation as for a taking under the power of eminent domain.'"

The finding and decision state:

"Finding VIII. The market value of the Pipestone Reservation in February, 1891, taking into consideration its value for grazing and agricultural purposes, the value of its mineral rights, and its historical value was $100,000.

"The Court decided that plaintiffs were entitled to recover as just compensation for the taking of the Pipestone Reservation $100,000 with interest from March 1, 1891, until paid."

———o———

CONCLUSION

It is submitted that the foregoing facts and authorities establish that:

1. The Commissioner of Indian Affairs was without power to take an undivided half interest in the Shoshone's Treaty Reservation.

2. The compensation allowed for the temporary use and occupation is inadequate.

3. The permanent taking occurred in 1927; and

4. Such amounts must be added to the value of the use and to the value of the undivided half interest as will produce the present full equivalent paid contemporaneously.

Finally, let it be remembered, the Shoshones have ever been loyal and friendly to their Government and its citizens (Finding 4, R. 36-37).

"Their attitude toward the Government and its officers was always one of fullest cooperation and

they always faithfully fulfilled their agreements and promises * * * he (Chief Washakie) and the members of his tribe implicitly trusted the Government not to overreach them * * * have been at peace with the whites since they first encountered Lewis & Clarke in 1805 * * * Washakie took a large war party of the Shoshones across Big Horn Mountain as an ally of the United States to assist General Crook in his campaign against the Sioux on the Rosebud in 1876, and at other times furnished soldiers to aid the United States Army in its wars with Indians such as the Sioux, the Arapahoes and the Cheyennes. * * * In many instances the Shoshone Indians furnished aid and comfort to the white emigrants passing through their country on the Oregon Trail and assisted in protecting the whites from hostile Indians."

It is this simple, friendly, faithful people who now ask only for just compensation. Many of the wrongs they have suffered can never be redressed. Their diversified farm home has been broken up and they have been crowded back to the uplands, to the lighter soil and the boulders, while the Arapahoe intruders enjoy the fertile lower river valleys. They have had an alien enemy quartered on their lands, with all the attendant dread of savage methods of Indian warfare. Such elements of damage are not compensable in this case yet when, after all of these years, justice is meted out to the Shoshones it is submitted that it should be measured with no niggardly and reluctant hand. Let it be that just compensation which should flow from a rich and powerful nation dealing with

a weak, untutored but trusting and every loyal friend. Let it be, as said by this court in *Choctaw Nation,* supra, "that superior justice which looks only to the substance of the right."

Respectfully submitted,

THE SHOSHONE TRIBE OF INDIANS OF THE WIND RIVER RESERVATION IN WYOMING,

By GEORGE M. TUNISON,
Counsel for Petitioner.

CHARLES J. KAPPLER,
ALBERT W. JEFFERIS,
FRANCIS S. HOWELL,
Of Counsel.

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No. 328

—o—

Supreme Court of the United States

—o—

OCTOBER TERM, 1936

—o—

THE UNITED STATES,

Petitioner,

vs.

SHOSHONE TRIBE OF INDIANS OF THE WIND RIVER RESERVATION IN WYOMING.

—o—

ANSWER TO CROSS-PETITION OF THE UNITED STATES IN CASE No. 328

—o—

Petitioner has not been favored with the Government's brief on its cross-petition in Case No. 328, *United States v. Shoshone Tribe.* We feel however that we understand the Government's position as stated in its cross-petition and deem it proper, since the cross-appeals are to be argued together, to here make answer. The Government's contentions, as stated in its Specification of Errors (cross-petition p. 9), are that the court below erred:

1. In holding that there was a "taking" by the Government of an undivided one-half interest in the Shoshone reservation for the benefit of the Arapahoes when the Commissioner of Indian Affairs on August 13, 1891, advised the Woodruff Commission that the Arapahoes had equal rights in the reservation which did not depend upon further consent of the Shoshones.
2. In not holding that the "taking" occurred in 1878 when the Arapahoes were removed by the Govern-

ment to the Shoshone reservation without the consent of the Shoshones and thereafter maintained there over the continued objection and protest of the Shoshones.

3. In holding that the Act of March 3, 1883, granted the Shoshones an interest in and to the reservation in addition to those interests which were granted by the Treaty of 1868.

STATEMENT

It is deemed necessary to call attention to a material inaccuracy appearing in the Statement in the Government's cross-petition, relating to the circumstances under which the Arapahoes came to the Shoshone reservation, p. 4, viz.:

> "Irwin was authorized and directed to proceed at once to the Shoshone Reservation and consult with the Indians there, with the intent of gaining their consent to the placing thereon of the Northern Arapahoes (hereafter called the Arapahoes), both tribes to be under one agent, and with instructions to represent to them the advantage of having a friendly neighboring tribe associated with them, and to present such arguments as would obtain their ready consent to the proposed arrangement (R. 44). Agent Irwin proceeded to the Shoshone Reservation (R. 44), and, after a council *upon the subject* with them and their chief, sent a telegram to the Commissioner of Indian Affairs at Washington, dated Cheyenne, Wyoming, October 17, 1877, as follows (R. 44-45) (italics ours):
>
> > "'I returned from Shoshone Agency today. Held council and made peace between Shoshones and Arapahoes.'"

The facts are that Agent Irwin did not present to the Shoshones, directly or indirectly, the *subject* of placing the Arapahoes upon the Shoshone reservation. The facts

found by the Court are directly contrary to the above statement in the Government's Cross-Petition.

> "Agent Irwin discussed with Chief Washakie and the Shoshones the matter of the contemplated removal of the Northern Arapahoe Band of Indians from their then location, but distinctly told Chief Washakie and the Shoshones that the President had no intention of placing the Arapahoes on the reservation of the Shoshones, and that this was not the design of the Government * * * the Government did not intend to place the Arapahoes directly on the Shoshone reservation. * * * Agent Irwin did not ask the Shoshones to express their willingness to admit the * * * Arapahoe * * * Indians amongst them * * * either temporarily or permanently, and the Shoshone Tribe of Indians did not at that time, or at any time thereafter express their willingness or give their consent to admit the Arapahoe Indians among them as permanent occupants" (Finding 10, R. 44-45).

—o—

ARGUMENT

We will consider the Government's three specifications, stated in its cross-petition, in their order:

I.

With respect to the first of defendant's contentions, viz., that the court below erred in holding that there was a taking of title in 1891, the parties hereto are in agreement. This is one of the rare instances where on review both sides allege the same error and both sides are right. In support of its contention that there was no taking in 1891 petitioner has fully and comprehensively presented its views of the facts and law in its original brief, *ante,* and it would only burden the record and the court to repeat same.

II.

Defendant's second contention is that the taking of title occurred in 1878. The law respecting the authority and power of administrative officials such as the Commissioner of Indian Affairs to take Indian titles has been fully presented in petitioner's original brief, *ante,* in the discussion of the alleged 1891 taking. That same law is applicable to the 1878 taking now claimed by the defendant and need not be here repeated. There remains to discuss the facts of the alleged taking in 1878.

The findings and opinion of the court below are clear and unambiguous. The Arapahoes were allies of the Sioux and Cheyennes and were ancient enemies of the Shoshones (Finding 8, R. 42-43). The Arapahoes would not remain on their own reservation, provided for them by treaty and repeated efforts during the period 1851 to 1878 to place them in settled homes were without success (Finding 8, R. 43). The facts of the Arapahoes coming to the Shoshone reservation are found by the court in Finding 10, as follows:

> "About October 1, 1877, a delegation of the Sioux and Arapahoe Indians visited Washington and called upon the Commissioner of Indian Affairs and the President, and the matter of their location upon some reservation was discussed. James Irwin, who had previously been agent for the Shoshones, but who was then the Indian agent at the Red Cloud Agency, which then had supervision over the Northern Arapahoe Band of Indians, was present. He had been instructed on September 12, 1877, to come to Washington with this delegation and to bring his interpreter. October 4, 1877, the Commissioner of Indian Affairs requested the Secretary of the Interior that 'Dr. James Irwin, Indian Agent at Red

Cloud Agency, be authorized to proceed to the Shoshone Reservation in Wyoming and consult with the Indians there, with the intent to gain their consent to permit the Arapahoes (now at Red Cloud Agency) to remove to their (the Shoshone) reservation, both tribes to be under the control of one agent.' The requested authority was given, and on the same day the Commissioner of Indian Affairs wrote Irwin at the Grand Central Hotel, New York, to 'proceed at once to the Shoshone Reservation to consult with the Indians there, with the intent to gain their consent to the removal of the Arapahoes thither, both tribes to be under the care of one agent. You will represent to them the advantage of having a neighboring friendly tribe associated with them, and from your large experience with the Shoshones will be able to present such arguments as will obtain their ready consent to the proposed arrangement.'' James Irwin had been an Indian agent for a considerable time prior to this date and was well acquainted with and highly respected by many Indian tribes, including the Shoshones. He had previously been agent for several years for the Shoshones on the Wind River Reservation.

"Irwin proceeded to the Shoshone Reservation, of which James I. Patten was then in charge as Indian agent. Agent Irwin held a council with Chief Washakie and the Shoshone Indians. * * * Agent Irwin discussed with Chief Washakie and the Shoshones the matter of the contemplated removal of the Northern Arapahoe Band of Indians from their then location, but distinctly told Chief Washakie and the Shoshones that the President had no intention of placing the Arapahoes on the reservation of the Shoshones, and that this was not the design of the Government; that all that was desired was that the Shoshones make peace with the Northern Arapahoe Tribe of Indians and that the Department would have a piece of land near the mouth of the Sweetwater, near the eastern boundary line of the Sho-

shone Reservation, set apart for the Arapahoes; that although the agent of the Shoshones would be agent of the Arapahoes also, yet the Government did not intend to place the Arapahoes directly on the Shoshone Reservation. This, as stated by Irwin at the time, was in accordance with the promise of the President to the delegation of Northern Arapahoe Indians on their visit to Washington in October 1877. In these circumstances Chief Washakie and the Shoshones agreed to make peace with the Arapahoes and informed Agent Irwin that they had nothing to say against their agent being over the Arapahoe Tribe also, but that they wanted the Arapahoes placed on a reservation apart from the Shoshones, giving as their reason therefor that the reservation, as at that time, was none too large for the use of the Shoshones, and, furthermore, that the Shoshones were afraid that the two tribes would not agree well together—that the Arapahoes would probably ill-behave themselves and bring trouble upon the Shoshones. At the same time, Irwin informed Agent Patten, of the Shoshone Reservation, that "the President promised the Arapahoes a reservation at the Red Buttes, including the mouth of the Sweetwater, and that is what the Arapahoes wanted, and that the agent of the Shoshones should be their agent, and that is * * * all the President will ask to have done." Agent Irwin did not ask the Shoshones to express their willingness to admit the Band of Northern Arapahoe and Cheyenne Indians amongst them upon their reservation or to consent to the placing of the Indians upon the Shoshone Reservation, either temporarily or permanently, and the Shoshone Tribe of Indians did not at that time, or at any time thereafter, express their willingness or give their consent to admit the Arapahoe Indians amongst them as permanent occupants." * * * (Finding 10, R. 43-45).

"On February 21, 1878, Agent Patten again wrote the Commissioner of Indian Affairs, referring specifi-

cally to the council with the Shoshones held by James Irwin the preceding October, calling attention to the fact that at that council the Shoshones had not expressed their willingness to admit the Arapahoes amongst them nor consented thereto, and again asked for instructions concerning the matter, to which no reply was made. The Northern Band of Arapahoe Indians was then being brought from Fort Fetterman to the Shoshone Reservation under military escort. Some of them arrived there March 18, 1878, without any previous knowledge to the Shoshones of their coming." * * * (Finding 10, R. 47).

"On March 19, 1878, Chief Washakie and a number of Shoshones met the Arapahoe delegation at the agency with Black Coal, the main chief, and Sharp Nose, White Horse, Six Feathers, and Friday, the latter being able to speak English. After some discussion between the Shoshones and Arapahoes the latter explained to Chief Washakie that their horses and their traveling equipment were in very bad condition; that their horses needed food and rest; that the Arapahoes were without food, and many of their number were sick; whereupon the Shoshones, through Chief Washakie, remembering their council with Irwin and Patten the preceding October, informed the Arapahoe chiefs that they might remain there for only a brief visit, but that they would have to leave as soon as they had rested and fed their horses. The Arapahoes stated that they could not possibly return to the place they had come from and asked Washakie to grant them permission to remain there for a little longer period than for a brief visit, so that their horses could be fed and rested, and that they would then remove from the reservation. They explained to Washakie that many of the Arapahoes had no horses at all; that they understood that the Government was preparing a reservation for them near the mouth of the Sweetwater River, and that they would go to this place as soon as possible. Thereupon, Chief Washakie

> stated to the Arapahoe delegation that he would permit them to come upon the Shoshone Reservation and remain there for a short time to rest for awhile and feed their horses. At this meeting the matter of the settlement of the Arapahoes upon the Shoshone Reservation was not mentioned and Washakie and the Shoshones were not then, or thereafter, requested to admit the Arapahoes amongst them upon the Shoshone Reservation." * * * (Finding 10, R. 47-48).

When the Arapahoes failed to leave the reservation, after the brief resting period granted by the Shoshones, the Shoshones promptly began to protest to their agent Patten. (Finding 10, R. 48). Patten transmitted these protests to the Commissioner of Indian Affairs (Finding 10, R. 49).

> "No reply was made by the Interior Department to this and many other reports of the agent calling attention to the persistent claims of the Shoshones that the Arapahoes were wrongfully upon that reservation and no steps were taken by the Department towards obtaining the consent of the Shoshones to admit the Arapahoes amongst them or to place the Arapahoes elsewhere. No action was taken by any official of the United States or the Interior Department concerning the location of the Arapahoes until August, 1891, when the Commissioner of Indian Affairs definitely held that the Arapahoes had equal rights with the Shoshones on the Shoshone Reservation, as hereinafter mentioned.
>
> "After the Arapahoes had camped upon the reservation, fed their horses, and had been furnished food and supplies by the agency for several months, the Shoshone Tribe, through Chief Washakie, began to protest to the agent against their continued presence upon the Shoshone Reservation. Such protests were thereafter continued and were mentioned from time to time in the reports of the Indian agent to the Commissioner of Indian Affairs, but no action was

taken thereon. The Arapahoes remained on the Shoshone Reservation, used and occupied the same equally with the Shoshones, pastured their stock and engaged in farming thereon, and received the benefits of all facilities and services equally with the Shoshones" • • • (Finding 10 R. 49-50).

In the opinion the Court states:

"Prior to August, 1891, the whole matter of the presence of the Arapahoes on the Shoshone Reservation was in a state of uncertainty. The record shows that the Shoshones desired and believed that the Government would finally provide a separate reservation for the Arapahoes, as the Shoshones had been advised would be done, and the Arapahoes were uncertain as to their rights upon the reservation and as to what would ultimately be provided for them. As late as March 30, 1886, the Arapahoes petitioned the Commissioner of Indian Affairs through Thomas M. Jones, then Indian Agent for the Shoshone Reservation, with reference to the uncertainty of their tenure. On that date Jones advised the Commissioner of Indian Affairs that "I am requested by the leading men of the Arapahoe Indians to state that they feel extremely uneasy in regard to their future prospects in view of a proposed bill before Congress respecting Indian lands. They fear that as Washakie, the chief of the Shoshones (so far as they can learn), has never surrendered on behalf of his tribe any of the land rights, to them, but has simply given his consent to the Arapahoes living here, and in case of passage of such an act, the law will fix it that this land belongs solely to the Shoshones and hence that they will be left out on this reservation and also on the one they came from." The Department instructed Agent Jones to inform the Arapahoes that they would be taken care of • • • (Opin., R. 76).

The theory of the Government in the court below was that the Shoshones had consented, without consideration, to give away a half interest in their beautiful home to

their ancient enemies, the Arapahoes (Opin., R. 31). Now, abandoning that contention, the Government claims that the half interest was forcibly taken from the Shoshones in 1878. The difficulty with this contention is that the Shoshones knew nothing of any such claim. They were highly honorable people. They respected their pledged word and they believed the Government would respect its pledged word (Finding 4, R. 36-7). So we have the unusual situation of the Government now claiming that the half interest in the Shoshones' treaty reservation was taken from them in 1878 by the mere "thought" of the the Commissioner of Indian Affairs, which "thought" was not at that time, nor thereafter until 1891, even communicated or made known to the Shoshones. The mere statement of such a proposition is startling yet it appears in the Government's Cross-Petition herein at pages 10-11, as follows:

> "The findings and opinion of the Court of Claims show that the Arapahoes were placed by the Government on the Shoshone reservation in 1878 without the consent of the Shoshones (except for a brief temporary period), and were thereafter continually kept there over the objection and protest of the Shoshones. The fact that the Arapahoes were removed to the Shoshone reservation upon the mistaken assumption that the consent of the Shoshones had been obtained or the fact that the Indians may have understood that provision would later be made for a separate reservation for the Arapahoes (R. 76) does not alter the situation that there is nothing in the findings or the opinion below from which the conclusion can be deduced that the Arapahoes were placed on the Shoshone reservation for any mere temporary purpose. Those in charge of Indian Affairs *thought* they had the consent of the Shoshones to the removal of the Arapahoes for permanent set-

> tlement and they thereafter continually kept the Arapahoes upon the reservation despite the repeated objections and protest of the Shoshones (italics ours).
>
> "The so-called ruling of the Commissioner of Indian Affairs of August 13, 1891, which the court below held constituted the taking, did not alter what had became a *fait accompli.*"

This Court has recently held in *United States v. Creek Nation,* 295 U. S. 103, that Indian treaty lands may not be taken by mistakes of officials of the Interior Department:

> "Plainly the appropriation was not in 1873, when Darling's survey was approved by the Commissioner of the General Land Office. That survey did not effect any change in the existing ownership; nor was it intended to do so. The most that can be said of it is that it was done erroneously and, in the absence of correction, might lead to further error."

It is further contended by the Government that Congress recognized the permanent location of the Arapahoes on the Shoshone reservation, prior to 1891, by making appropriations "for the Northern Cheyennes and Arapahoes in Wyoming and on the Tongue River in Montana" (Cross-Petition, p. 12). None of the acts referred to are capable of the construction claimed and it would be a startling innovation in our jurisprudence to hold that property rights may be divested in such indirect manner.

Legislation affecting the Indians is to be construed in their interest and a purpose to make a radical departure is not lightly to be inferred. *U. S. vs. Nice,* 241 U. S. 591; *Leavenworth et al R.R. vs. U. S.,* 92 U. S. 733.

One complete answer to such contention is that the Government of the United States, at any time up to

the filing of this suit under the Jurisdictional Act, could have brought and sucessfully maintained a proper action as guardian of the Shoshones, to exclude and eject the Arapahoes from the Shoshone tribal lands. One of the very purposes of the Jurisdictional Act was to put an end to the uncertain tenure of the Arapahoes on the reservation.

The court below found with respect to the 1891 letter of the Commissioner of Indian Affairs that:

> "This is the only action ever taken by anyone representing the United States with reference to the permanent settlement and location of the Northern Arapahoe Band of Indians upon the Shoshone Reservation. * * * " (Finding 11, R. 50).

The court further found:

> "No action, except the enactment of the Jurisdictional Act in this case, was ever taken by Congress with reference to the presence of the Arapahoe Indians upon the Shoshone Reservation * * *" (Finding 11, R. 51).

It is submitted that the foregoing findings preclude the claim that the Shoshones' title was taken in 1878 by what the Commissioner of Indian Affairs may, in his own secret mind, have "thought," or that Congress surreptitiously, by language hidden away in Indian appropriation acts, intended to and did take the Shoshone title.

III.

Defendant's third and final contention is that the court erred in holding that the Act of 1883 granted the Shoshones an interest in their reservation greater than that granted by the Treaty of 1868. Petitioner's position is that the Jurisdictional Act of 1927 was a basic act upon which all rights should be predicated and adjudicated.

It authorized judgment on the claims of the Shoshones arising under or growing out of the treaty of 1868 or any subsequent agreement or "any subsequent Act of Congress affecting said tribe." Hence, it is submitted that the rights of the Shoshones, in bringing this suit under the Act of 1927, are to be adjudicated in accordance with the provisions of the 1868 treaty, the subsequent agreements of 1896 and 1904 and any Acts of Congress up to 1927.

BENEFICIAL OWNERSHIP OF NATURAL RESOURCES ON SHOSHONE RESERVATION IN TRIBE

Among the early recognitions by Congress of the beneficial ownership by Indian tribes of the natural resources of their treaty reservations and of the fact that such lands belong to them in their entirety is the act of February 6, 1871 (16 Stat. 404), which provided in Sec. 1 that two townships set apart for the Stockbridge and Munsee Indians of the State of Wisconsin shall be appraised, and that such appraisal shall state the quality of the soil, quantity, quality, and value of the timber, which shall be sold at the appraisal price by the Secretary of the Interior; and in Sec. 4, provided that the gross amount of money realized, after deducting therefrom certain moneys appropriated by the act, shall be paid to and expended for the benefit of the Indians.

Congress by the act of April 25, 1876 (19 Stat. 37), authorized the Secretary of the Interior to sell certain pine lands on the Menominee reservation and by Sec. 2 provided that the proceeds arising from all sales of such timber, after deducting certain expenses incident to the cutting and sale of said timber, shall be placed to the

credit of the United States for the benefit of said Menominee Indians.

The act of June 15, 1880 (21 Stat. 199), in Sec. 3, provided for the sale of lands belonging to the Ute Indians of Colorado, whether mineral or otherwise, in accordance with existing law and the proceeds of sale shall, after reimbursing the United States for all sums set apart or paid out by the act, be deposited as now provided by law for the benefit of said Indians. Similar acts were passed covering the Green Bay Reservation, March 31, 1882 (22 Stat. 36), and the Crow Reservation, April 11, 1882 (22 Stat. 42).

Act of March 3, 1883

Congress next passed the act of March 3, 1883 (22 Stat. 582-590), covering all Indian reservations, and reading as follows:

> "Sec. 2, * * * The proceeds of all pasturage and sales of timber, coal, or other products of any Indian reservation, except those of the Five Civilized Tribes, and not the result of the labor of any member of such tribe, shall be covered into the Treasury for the benefit of such tribe under such regulations as the Secretary of the Interior shall prescribe; and the Secretary shall report his action in detail to Congress at its next session."

Supplementing the act of 1883, Congress on March 2, 1887 (24 Stat. 449-463), enacted:

> "That the Secretary of the Interior is hereby authorized to use the money which has been or may hereafter be covered into the Treasury under the provisions of the act approved March 3, 1883, and which is carried on the books of that Department under the caption of "Indian moneys, proceeds of labor," for the benefit of the several tribes on whose

account said money was covered in, in such way and for such purposes as in his discretion he may think best, and shall make annually a detailed report thereof to Congress."

Since the above cited acts were passed the general and constant policy of Congress up to the present time has been to recognize that in addition to the right of use and occupancy of Indian treaty reservations, the Indians had complete equitable property not only in the surface but in all resources of every nature and in every element of value in such reservations under and above the surface. Such recognition is indicated by both general and special legislation bearing on the subject. For the information of the Court a list of such legislation is printed in Appendix "A" hereto, pp. 75, 76.

In addition to the general laws pertaining to the sale or lease of natural resources on Indian reservations for the benefit of the Indians and which apply equally to the Shoshones cited in the appended list, attention is called to the special legislation pertaining to the Shoshone Indians of the Wind River Reservation in Wyoming, as follows:

Act of March 3, 1905, 33 Stat. 1016.

"Art. 2. In consideration of the lands ceded, granted, relinquished and conveyed by Article I of this agreement, the United States stipulates and agrees to dispose of the same as hereinafter provided under the provisions of the homestead, townsite, coal, and mineral land laws, or by sale for cash * * * that lands entered under the townsite, coal and mineral land laws shall be paid for in an amount and manner as provided by said laws * * * and the United States agrees to pay the said Indians the proceeds derived from the sales of said lands, the

amount so realized to be paid to and expended for said Indians in the manner hereinafter provided.

* * * * *

"Art IX. It is understood that nothing in this agreement contained shall in any manner bind the United States to purchase any portion of the lands herein described or to dispose of said lands except as provided herein, or guarantee to find purchasers for said lands or any portion thereof, it being the understanding that the United States shall act as trustee for said Indians to dispose of said lands and to expend for said Indians and pay over to them the proceeds received from the sale thereof only as received, as herein provided."

By the act of February 25, 1909 (35 Stat. 650), the act of March 3, 1905, was amended so as to give locators of mineral lands on the ceded portion of the reservation five years instead of three years within which to make entry and payment.

By the act of August 21, 1916 (39 Stat. 516) it was provided:

"That the Secretary of the Interior is hereby authorized and empowered to lease, for the production of oil and gas therefrom, lands within the ceded portion of the Shoshone or Wind River Indian Reservation in the State of Wyoming under such terms and conditions as shall be by him prescribed; and the proceeds or royalties arising from any such leases shall first be applied to the extinguishment of any indebtedness of the Shoshone Indian tribe to the United States and thereafter shall be applied to the use and benefit of said tribe in the same manner as though secured from the sale of said lands as provided by the act of Congress approved March 3, 1905. * * * (See Act of March 27, 1928, 45 Stat. 371-2 on same subject).

Incidentally, it will be noted that in the foregoing act, as late as 1916, Congress provided that the proceeds from the oil and gas leases on the Shoshone reservation should be applied to extinguish indebtedness of the "Shoshone Tribe." Congress made no mention of the Arapahoes.

By the act of May 21, 1928 (45 Stat. 617), Congress authorized the allotment of lands on the diminished Shoshone or Wind River Reservation, Wyoming, classified as non-irrigable, non-timbered grazing lands, to unalloted children, and then provided:

> "That all minerals including oil and gas, on any of the lands allotted hereunder are reserved in common for the benefit of the Indians having rights on the reservation, and may be leased for mining purposes under existing law."

The record in this case shows that the Shoshone treaty and the agreements, as understood by the Shoshone Indians, as represented to them by treaty commissioners, as recognized and accepted by the Government throughout all of its transactions, the acts of the officers of the United States and the Acts of Congress itself, when fairly interpreted vest in the Shoshone Indians every right and title to their treaty reservation except the bare naked fee title held in trust for them by the United States.

The legislative history of Congress respecting the Indians indicates that the United States never intended and does not intend to profit from any resources on Indian reservations, and that the holding of the mere naked title was solely for the protection of the interests of the Indians during their pupilage.

Under the Shoshone treaty of 1868 the use and occupation of the lands in the reservation in their entirety were retained in the Shoshone Tribe forever, except when released in accordance with the terms of the treaty itself. This Court in Leavenworth R. R. Co. v. United States, 92 U. S. 733-742, said: "For all practical purposes, the Osages owned the lands; as the actual right of possession, the only thing they deemed of value, was secured to them by the treaty of June 2, 1825, until they should elect to surrender it to the United States. In the free exercise of their choice, they might occupy their lands forever, and whatever changed this condition or interfered with it violated the guarantees under which they had lived since that date." It would be doing violence, it is submitted, to reason and common sense to say that the wealth above and underlying the surface of the reservation lands should remain dormant forever. The treaty prohibits any one coming on the reservation except certain persons named who, in the nature of things, would not be permitted to go there for mining purposes.

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ATTORNEYS GENERAL'S OPINIONS

The progressive policy of Congress in its legislation passed session after session since 1871 establishes that the natural resources embraced within Indian reservations beneficially belong to the respective Indian tribes notwithstanding the naked legal title is in the United States. That the trend of legislative acts recognizes such right and ownership in the Indian tribes is interestingly set forth in the opinion of Acting Attorney General

Knaebel, dated Sept. 5, 1911, and reported in 29 Opp. Atty. Gen., pages 239-242, in relation to the lands of the White Mountain Apache Indian reservation. In this opinion Acting Attorney General Knaebel says:

"To be 'Indian country' it is not essential that a given area should be within an Indian reservation (ibid); it is of importance, however, to note that in the view of the Supreme Court, as expressed in Wilson's case, the reservation was a valid reservation—recognized indeed by Congress itself—of land subject to the Indian title. It was from the beginning, or had grown to be, something more than a mere refuge for the tribes collected there; the Indians were interested in the land. And this conception of an interest, not assertable, if you please, against the Government, but still an interest recognized by Congress as extending throughout the *entire* reservation (General Allotment Act of Feb. 8, 1887, 24 Stat. 388, Sec. 1, Sec. 5, third proviso), is confirmed and strengthened by subsequent acts of Congress, relating to this reservation exclusively.

"Thus by the act of February 20, 1893 (27 Stat. 469) it was provided that the money proceeds (over fees and survey expenses) to accrue from the sale of the lands which it took from the reservation and restored to the public domain should be held in trust 'for the sole use and benefit of the tribes of Indians now located upon said reservation,' and be expended for the best interests of those tribes. While this act, according to the declaration of the fifth section, was not to be construed as recognizing 'title or ownership' in the Indians, it contained no denial of their interest in the lands, but provided, as we have seen, a way for compensation for the land of which it deprived them.

"By the Indian Appropriation Act of March 2, 1895, the Secretary of the Interior was authorized to negotiate with the Indians of this reservation 'for the cession or relinquishment to the United

States of the lands embracing the coal fields,' it being provided that any agreement made should be submitted to Congress for its action (28 Stat. 894). An agreement was made and submitted and received the approval of Congress (Act June 10, 1898, 29 Stat. 358 et seq.). The agreement is set forth in the statute. It contains four articles. By Article I the Indians, that is, the Apache, Mohave, and Yuma Indians residing on the reservation, cede, grant and relinquish to the United States all their right, title and claim to a certain described portion of the reservation. By Article II the United States in consideration of the cession agrees;

"To place in the Treasury of the United States to the credit and for the sole benefit of the said Apache, Mohave and Yuma Indians and to account therefor annually, to them through their agent, the net proceeds accruing from the disposal of such coal and mineral lands, lying within the ceded territory, under the laws applicable thereto; and that said money shall be paid to them in cash from time to time as the same shall become available, pro rata, share and share alike to each man, woman and child of the tribes now living upon and entitled to the privileges of the said reservation.

"Article III provides for a survey, 'for the purpose of segregating the ceded land from the diminished reservation,' and that the cost shall be paid from the proceeds of the ceded lands.

"A later enactment restored another small tract of this reservation to the public domain, for sale under the mining laws. Although the area was but 231 acres, Congress nevertheless provided that the proceeds of sale, after deducting the expenses, should be held in trust for the tribes of Indians on the reservation, to be expended by the Commissioner of Indian Affairs under the direction and control of the Secretary of the Interior, for the best interests of those tribes (Act of March 2, 1901, 31 Stat. 952).

"From the character of the legislation as passed in review, there can be little doubt that in the mind and policy of Congress this reservation was not only a valid reservation set apart for the occupancy and enjoyment of the various tribes which have inhabited it from the beginning, and subject to be allotted in part to the individual members composing them, but was to be devoted to them in its *entirety* in such a sense that no part of it should be taken from them without their consent or giving something in return by way of compensation. And, of course, no distinction here is to be taken between the land and the timber growing upon it and, presumably, constituting its chief value (U. S. v. Cook, 19 Wall. 591).

"The act of June 25, 1910 (36 Stat. 955, Sec. 7) passed since the proclamation was issued, still further and more definitely extends and declares the same policy as to all such reservations in general. It provides:

"That the mature living and dead and down timber on unallotted lands of any Indian reservation may be sold under regulations to be prescribed by the Secretary of the Interior, and the proceeds from such sales shall be used for the benefit of the Indians of the reservation in such manner as he may direct: Provided, That this section shall not apply to the States of Minnesota and Wisconsin."

* * * * *

A more recent and a cogently argued opinion of the Attorney General with regard to ownership of the resources on Indian reservations being in the respective Indian tribes is that of Mr. Attorney General Stone, dated May 27, 1924, and reported in 34 Opp. Atty. Gen., page 181. The following is quoted from said Opinion, page 189:

If the extent of the Indian rights depended merely on definitions, or on deductions to be drawn from

descriptive terms, there might be some question whether the right of "occupancy and use" included any right to the hidden or latent resources of the land, such as minerals or potential water power, of which the Indians in their original state had no knowledge. As a practical matter, however, that question has been resolved in favor of the Indians by a uniform series of legislative and treaty provisions beginning many years ago and extending to the present time. Thus the treaty provisions for the allotment of reservation lands all contemplate the final passing of a perfect fee title to the individuals of the tribe. And that meant, of course, that minerals and all other hidden or latent resources would go with the fee. The same is true of the general allotment act of 1887, which applies expressly to Executive order reservations, as well as to others. Then, beginning many years ago, many special acts were passed—with or without previous agreements with the Indians concerned—whereby surplus lands remaining to the tribe after completion of the allotments were to be sold for their benefit. In all these instances Congress has recognized the right of the Indians to receive the full sales value of the land, including the value of the timber, the minerals, and all other elements of value, less only the expenses of the Government in surveying and selling the land. Legislation and treaties of this character were dealt with in Frost v. Wente (157 U. S., 46-50); Minnesota v. Hitchcock (185 U. S. 373); Lone Wolf v. Hitchcock (187 U. S. 553); United States v. Blendaur (128 Fed. 910, 913); Ash Sheep Co. v. United States (252 U. S. 159).

Similar provisions have been made in many other cases for the sale of surplus tribal lands, all the proceeds of all elements of value to go to the tribe. In a recent act for further allotment of the Crow Indian lands (41 Stat. 751), the minerals are reserved to the tribe instead of passing to the allottees (Sec. 6); and moreover, unallotted lands chiefly

valuable for the development of water power are reserved from allotment "for the benefit of the Crow Tribe of Indians" (Sec. 10). The Federal Water Power Act of June 10, 1920 (41 Stat. 1083) applies to tribal lands in Indian reservations of all kinds, but it provides (Sec. 17) that "all proceeds from any Indian reservation shall be placed to the credit of the Indians," etc.

Again, by a provision of the Indian appropriation act of June 30, 1919, the Secretary of the Interior was authorized to lease for the purpose "of mining for deposits of gold, silver, copper and other Metalliferous minerals," any part of the unallotted lands within "any Indian reservation" within the States of Arizona, California, Idaho, Montana, Nevada, New Mexico, Oregon, Washington, or Wyoming heretofore withdrawn from entry under the mining laws. These states contain numerous Executive order reservations, and yet the act declares that all the royalties accruing from such leases shall be paid to the United States "for the benefit of the Indians" (41 Stat. 3, 31, 33). * * *

In respect to legislation and treaties of this character two views are possible. First, that the right of occupancy and use extends merely to the surface and the United States, in providing that the Indians shall ultimately receive the value of the hidden or latent resources, merely gives them its own property as an act of grace. Second, that the Indian possessions extended to all elements of value in or connected with their lands, and the Government in securing those values to the Indians recognizes and confirms their preexisting right. If it were necessary here to decide as between these opposing views I should incline strongly to the latter; mainly because the Indian possession has always been recognized as complete and exclusive until terminated by conquest or by the exercise of that plenary power of guardianship to dispose of tribal property of the Nation's wards without their consent (Lone Wolf v.

Hitchcock, 187 U. S., 554). Moreover, support for this view is found in many expressions of the courts. Thus, in the case just cited, the court quotes from Beecher v. Wetherby (95 U. S., 517, 525) as follows:

"But the right which the Indians held was only that of occupancy. The fee was in the United States, subject to that right, and could be transferred by them whenever they chose. The grantee, it is true, would only take the naked fee and could not disturb the Indians; that occupancy could only be interfered with or determined by the United States."

If a transfer by the United States would convey only the naked fee, it goes without saying that the complete equitable property was in the Indians. The earlier and fundamental decisions make this plain. In Worcester v. Georgia (6 Pet. 515, 543, 544) Chief Justice Marshall clearly states that the right asserted in behalf of the discovering European nations was merely a right, as against each other, which he defines as "the exclusive right of purchasing such lands as the natives were willing to sell." As late as 1872 the Supreme Court said:

"Unmistakably their title was absolute, subject only to the preemption right of purchase acquired by the United States as the successors of Great Britain, and the right * * * to prohibit the sale of the land to any other governments or their subjects (Holden v. Joy, 17 Wall. 211, 244." * * *

The opinion cited by the Government, reported in 19 Opp. Atty. Gen., page 194, was rendered November 20, 1888, since which time Congress has by numerous acts recognized the rights of the Indians to the natural resources on their reservations. Furthermore, the 1888 opinion was overruled by the opinions of 1911 and 1924 above quoted.

This Court has held in Mitchel vs. United States, 9 Pet. 756, and in same case reported in 15 Pet. 84, that the

right of the Indians in their lands is not that of mere occupancy and perpetual possession, but a right of property, held under the guaranty of treaties.

Reverting to the Act of March 3, 1883, it is submitted that the Indian tribes or nations holding their reservations by treaty own the surface and everything above and below the surface, including all elements of value, but they cannot dispose of any part thereof without the consent of the United States, due to the naked title being in the United States. If a member of the tribes were permitted to sell or lease timber, mineral rights, pasturage, and other resources on the reservation lands held in common, he would have an undue advantage over the other Indians. The method adopted by the United States of granting the proceeds from such natural resources to the tribe as a whole permitted a just and equal distribution of the proceeds derived from such resources among the members of the tribe entitled thereto.

While said act of 1883 did not, in so many words, grant to the Indian tribes the right to remove the timber, minerals and other resources of value (the removal being a mere administrative matter lodged with the guardian), nevertheless it did what in effect amounts to the same thing—confirm to the Indian tribes all proceeds arising from the disposal of such resources embraced within the reservation lands. Possessing the reservation lands and all resources thereon prior to the passage of the act of 1883 so long as they existed as a tribe or nation of Indians, Congress by said act of 1883 recognized in effect, if not directly, their lawful right both to the land and the resources thereof, the United States re-

taining only the pre-emption right, as stated by Chief Justice Marshall, to purchase (6 Pet., 515).

Giving due regard to substance and not to mere form, in construing the act of 1883, supported as it is by subsequent legislation clearly showing the intent of Congress respecting the ownership of natural resources on Indian reservations, the conclusion expressed by Mr. Attorney General Stone that:

> "If a transfer by the United States would convey only the naked fee, it goes without saying that the complete equitable property was in the Indians,"

cannot be avoided.

When this suit was commenced pursuant to the Act of March 3, 1927, sales of timber and leases of mineral rights were recognized by law. The Government must respond in damages under the facts and law as they existed when this suit was instituted since the jurisdictional act provides that the judgment in the suit to be brought thereunder shall annul and cancel the Shoshone's titles.

The Court of Claims, in arriving at the value of the one-half interest in the Shoshone's reservation, committed no error in considering the beneficial ownership of the resources as a part of the value of the land itself. The Act of March 3, 1883, was in full force and effect during the period for which value was fixed, and the proceeds accruing to the Shoshones from sales and leases were as much a part of the lands as though the Indians held complete title to such lands. For all intents and purposes

there is no difference in this proceeding whether the tribe had a fee simple title, or whether the Government held the mere naked fee. All benefits during the period in question of a collateral nature arising from the land belonged to the Shoshone tribe; in other words, such benefits were attached to the land, and consequently during the period in question the land and the benefits were inseparable. Everything in the nature of value arising out of the land which the Shoshone Indians legally enjoyed should be considered as part of the land in estimating value.

Government's Authorities

Only two cases are cited by the Government in its petition for certiorari. Both are readily distinguishable.

The opinion in the Cook case, 19 Wall., 591, was rendered prior to the enactment of the act of March 3, 1883, and subsequent relative acts; furthermore, the treaty and the facts in that case are totally different from those in the instant case. There a small number of the tribe seeking personal profit cut and sold timber from the tribal land. Clearly this was unlawful.

In Pine River Logging & Improvement Co. v. United States, 186 U. S. 280, decided June 2, 1902, there is no citation or reference in the record, briefs or decisions to the act of March 3, 1883, consequently the courts did not pass upon the intent and effect of said act. Indeed the case is authority for the Shoshone's claim that the timber on the reservation is the property of the tribe as

a whole. Certain individual Indians had made contracts, under the Act of February 16, 1889, to log out and sell to the defendants, dead and down timber. The defendants took quantities far in excess of the contracts and were forced to account to the United States therefor. The court said:

> "In short, the object of these regulations (regulating sales under the act) was to prevent exactly what was done in this case, that is, the appropriation to a few Indians of the benefits of the act to the exclusion of the many."

CONCLUSION

It is submitted that the contentions made by the Government in its cross-petition have been fairly met and fully disposed of, and that the prayer of petitioner Shoshone Tribe for reversal of the judgment of the Court of Claims should be granted.

Due to facts and circumstances beyond control of counsel this case has been pending many years. In event the position of the Shoshones is sustained and the judgment of the Court of Claims reversed, it is respectfully requested that the reversal be accompanied by appropriate directions so that there may be an expeditious ending of the litigation. It is believed that the record in the court below contains ample evidence for findings of

value in accordance with petitioner's theory of the taking of use and the permanent taking of title.

Respectfully submitted,

THE SHOSHONE TRIBE OF INDIANS OF THE WIND RIVER RESERVATION IN WYOMING,

By GEORGE M. TUNISON,
Counsel for Shoshone Tribe.

CHARLES J. KAPPLER,
ALBERT W. JEFFERIS,
FRANCIS S. HOWELL,
Of Counsel.

APPENDIX A.

General Acts of Congress in re Proceeds from Resources on Indian Reservations:

March 3, 1883, 22 Stat. 582, 590.
February 8, 1887, 24 Stat. 387, Sec. 5.
March 2, 1887, Ch. 320, 24 Stat. 449-463.
June 4, 1888, 25 Stat. 166.
February 16, 1889, 25 Stat. 673.
February 28, 1891, Sec. 3, 26 Stat. 744.
June 25, 1910, Sec. 7, 36 Stat. 855.
March 4, 1913, 37 Stat. 1015.
February 27, 1917, Secs. 1-4, 39 Stat. 944.
June 30, 1919, Sec. 26, 41 Stat. 3.
June 10, 1920, Sec. 17, 41 Stat., 1063.
May 29, 1924, 43 Stat. 244.
April 17, 1926, 44 Stat. 300.
July 3, 1926, 44 Stat. 890.
December 16, 1926, 44 Stat. 922.
March 3, 1927, 44 Stat. 1347.
June 18, 1934, Sec. 6, 48 Stat. 984-986.
June 28, 1934, Sec. 11, 48 Stat. 1268, 1273.

Special Acts of Congress in re Proceeds from Resources on Indian Reservations:

February 6, 1871, Secs. 1-4, 16 Stat. 404	Stockbridge-Munsee
February 19, 1875, Sec. 6, 18 Stat. 330	Seneca
April 25, 1876, 19 Stat. 37	Menominee
June 15, 1880, Sec. 3, 21 Stat. 199	Ute
March 31, 1882, 22 Stat. 36	Green Bay
April 11, 1882, Sec. 3, 22 Stat. 42	Crow
May 24, 1888, Sec. 2, 25 Stat. 157	Uintah
January 14, 1889, Sec. 7, 25 Stat. 642	Chippewa
March 2, 1889, Sec. 2, 25 Stat. 1013	Miami
June 12, 1890, 26 Stat. 146	Menominee
October 1, 1890, Secs. 3-4, 26 Stat. 658	Round Valley
June 17, 1892, 27 Stat. 52	Klamath
July 1, 1892, 27 Stat. 62	Colville
February 20, 1893, 27 Stat. 469	White Mountain Apache
February 20, 1895, 28 Stat. 677	Utes
June 10, 1896, Art. 2, 29 Stat. 358	White Mountain Apache
June 7, 1897, 30 Stat. 90	Chippewa
July 1, 1898, 30 Stat. 571	Colville
February 12, 1901, 31 Stat. 785	Grand Portage
February 28, 1901, 31 Stat. 819	New York Indians
March 2, 1901, 31 Stat. 952	White Mountain Apache
May 27, 1902, 32 Stat. 245	Uintah
June 27, 1902, 32 Stat. 440	Chippewa

April 23, 1904, 33 Stat. 302	Flathead
April 27, 1904, Arts. 2-3, Sec. 6, 33 Stat. 352	Crow
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March 3, 1905, Art. 2, 33 Stat. 1016	Shoshone
March 3, 1905, 33 Stat. 1048	Uintah
March 22, 1906, Secs. 3-5-6, 34 Stat. 80	Colville
March 28, 1906, 34 Stat. 91	Jicarilla
June 21, 1906, 34 Stat. 325	Cour D'Alene
June 28, 1906, Para. 3, Sec. 3, 34 Stat. 539	Osage
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May 23, 1908, Sec. 5; 35 Stat. 268	Chippewa
May 29, 1908, Sec. 5, 35 Stat. 458	Spokane
May 30, 1908, Secs. 7-15, 35 Stat. 558	Fort Peck
February 28, 1909, 35 Stat. 650	Shoshone
May 27, 1910, Secs. 4-7, 36 Stat. 440	Pine Ridge
May 30, 1910, Secs. 4-7, 36 Stat. 448	Rosebud
June 1, 1910, Secs. 7-10-11, 36 Stat. 455	Fort Berthold
August 1, 1914, Sec. 23, 38 Stat. 582	Bad River
August 3, 1914, 38 Stat. 641	Fort Berthold
May 18, 1916, 39 Stat. 123	Red Lake
August 21, 1916, 39 Stat. 519	Shoshone
February 25, 1920, 41 Stat. 452	Flathead
June 4, 1920, Sec. 6, 41 Stat. 451	Crows
March 3, 1921, Sec. 6, 41 Stat. 1355	Fort Belknap
September 20, 1922, 42 Stat. 857	Ft. Peck-Blackfeet
May 26, 1926, Sec. 6, 44 Stat. 658	Crows
March 3, 1927, 44 Stat. 1401	Fort Peck
May 21, 1928, 45 Stat. 617	Shoshone
February 21, 1931, 46 Stat. 1202	Papago

APPENDIX B.

Upon Motion for New Trial in the court below the following supplemental findings regarding value were requested by petitioner.

SUPPLEMENTAL FINDING I.

The fair and reasonable value of one-half undivided interest of the 2,040,010 acres unallotted Tribal Lands of the Shoshone or Wind River Reservation, in 1927, was $9,531,704.50 (Plaintiff's requested Finding XXXI, Brief pp. 524-5).

SUPPLEMENTAL FINDING II.

The fair and reasonable value of the lands on said Reservation allotted in severalty to the Arapahoes, the

dates when said allotments were made, and the number of acres allotted are as follows:

Years	Acres	Amounts
1907	93,787.12	$1,137,566.24
1915	10,579.34	58,249.59
Total	104,366.46	$1,195,815.83

The fair and reasonable value in 1927 of said 104,366.46 acres of land on said Reservation so allotted in severalty to said Arapahoes was $1,690,619.00 (Plaintiff's requested Finding XXX, Brief pp. 523-4).

Nos. 216 and 328.

IN THE

Supreme Court of the United States

OCTOBER TERM.

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v.

THE UNITED STATES.

THE UNITED STATES, *Petitioner*

v.

SHOSHONE TRIBE OF INDIANS OF THE WIND RIVER RESERVATION IN WYOMING.

On Writs of Certiorari to the Court of Claims.

PETITIONER'S REPLY TO BRIEF FOR THE UNITED STATES.

THE SHOSHONE TRIBE OF INDIANS OF THE WIND RIVER RESERVATION IN WYOMING,

By GEORGE M. TUNISON,
Counsel for Shoshone Tribe.

CHARLES J. KAPPLER,
ALBERT W. JEFFERIES,
FRANCIS S. HOWELL,
Of Counsel.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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DATE OF "TAKING".

(1) On page 18 of defendant's brief filed December 10, 1936, counsel state that House Report No. 1628, 69th Congress, 2nd session, dated December 16, 1926, on S. 2301, referred to the Arapahoes as having been "moved" to the

Shoshone reservation in the "winter of 1877-78." In House Report No. 1983, 69th Congress, 2nd session, dated February 4, 1927, on H. R. 16838, being identical with the present Jurisdictional Act, which report was made just a month before the bill S. 5523 was approved by the President, it was stated the Arapahoes had been moved upon the Shoshone reservation in the "fall of 1877." This report says:

> "The principal claim of the Shoshone Indians is based upon the alleged violation by the United States of article 2 of the treaty with the eastern band of the Shoshone Indians concluded at Fort Bridger, Utah Territory, on July 3, 1868. The Shoshone Indian Reservation, by the terms of the treaty, was set apart—
>
> for the absolute and undisturbed use and occupation of the Shoshone Indians herein named, and for such other friendly tribes or individual Indians as from time they may be willing, with the consent of the United States, to admit among them, and the United States now solemnly agrees that no persons except those herein designated and authorized so to do, * * * shall ever be permitted to pass over, settle upon, or reside in the territory described in this article for the use of said Indians, and henceforth they will and do hereby relinquish all title, claims, or rights in and to any portion of the territory of the United States, except such as is embraced within the limits aforesaid.
>
> This is followed in Article II by the following declaration:
>
> No treaty for the cession of any portion of the reservations herein described which may be held in common shall be of any force or validity as against the said Indians, unless executed and signed by at least a majority of all the adult male Indians occupying or interested in the same; and no cession by the tribe shall be understood or construed in such manner as to deprive, without his consent, any individual member of the tribe of his right to any tract of land selected by him, as provided in article 6 of this treaty.

> Notwithstanding these specific agreements on the part of the United States and against the protests of the Shoshone tribe, the northern band of the Arapahoes, under military escort, was moved upon the reservation of the Shoshones in the *fall of 1877*. To disarm the Shoshones, they were assured by the military authorities that the Arapahoes would be removed from the reservation the following year, but no such removal ever too place. The Shoshones have frequently protested against the alleged unlawful appropriation of the reservation but have received no consideration from the Government. On the contrary, the Government has not only permitted the Arapahoes to remain upon the reservation but has turned over to them approximately one-half of the lands and provided allotments for them. Funds realized from the sale of lands or otherwise have been placed to the joint credit of the two tribes and the whole reservation and tribal funds treated as though the Arapahoes were legal joint owners with the Shoshones. Such action by Government officials has *at no time been sanctioned by Congress and is without legislative authority.*
>
> The purpose of the bill is to permit the Shoshones to submit their claims *for alleged appropriation of property* to the Court of Claims, and your committee feels that in view of the strong showing made the bill should be enacted without further delay." (Italics supplied.)

If, as contended by defendant's counsel, Congressional reports must be consulted to develop and comprehend the intention of Congress in passing the Jurisdictional Act, it should be here noted that the above report shows that Congress knew that the use of Shoshone lands had been *appropriated* without the sanction of Congress and that the Shoshone title to the lands was to be cancelled, thus bringing the case within the rule of "just compensation"—Act February 8, 1887, 24 Stat. 391. Sec. 10 of that acts reads as follows:

> That nothing in this act shall be so construed as to affect the right and power of Congress to grant the right of way through any lands granted to an Indian,

> or a tribe of Indians, for railroads or other highways, or telegraph lines, for the public use, *or to condemn such lands to public uses, upon making just compensation.* (Italics supplied.)

A reservation for Indians is a recognized public purpose: *Alaska Pacific Fisheries* v. *United States*, 248 U. S., 78; *Donnelly* v. *United States*, 228 U. S., 243.

It was found by the Court below that the Arapahoes first appeared on the Shoshone reservation March 18, 1878, "without previous knowledge of the Shoshones (Rec. 46, 47). The Court below found that their coming upon the Shoshone reservation was only temporary, until a reservation at Red Buttes, near the mouth of the Sweetwater, could be prepared for them; that the matter of permanent location was not discussed, the Commissioner of Indian Affairs failing to answer the Agent's letters bearing on the subject (Rec. 46, 47). The statements in the Congressional Reports above quoted although contradictory were intended as a mere general statement concerning the probable time the Arapahoes "moved" upon the Shoshone reservation, and had nothing whatever to do with the actual time of "taking." The Jurisdictional Act provided no time of "taking" (Rec. 77); that was left to the courts to determine if they found there was a "taking". The Court below found matters relating to the location of the Arapahoes in an indefinite state; no one asserted in 1878 that there would be a "taking"; there was no evidence showing the United States had actually appropriated one-half interest in the Shoshone reservation between 1878 and 1891 when on the latter date the letter of the Commissioner clearly indicated that the Arapahoes were to remain on the Shoshone reservation permanently. As the matter of "taking" was wholly indefinite prior to 1891, and the letter of the Commissioner of 1891 being the only official statement indicating an appropriation as of that date (the Arapahoes themselves in 1886 having made inquiry concerning their uncertain status on the Shoshone reservation

Rec. pp. 11, 76), it must be recognized there is color of evidence of attempted "taking" in the 1891 letter, whereas prior to 1891 there is nothing but a maze of indefiniteness and doubt (Rec. 50).

However, petitioner contends the only substantial evidence of actual taking is the act of March 3, 1927, which provided for the cancellation of the Shoshone title in the lands used and appropriated for the benefit of the United States and the Arapahoes.

The Jurisdictional Act for the first and only time, afforded the Shoshones an opportunity to present their constitutional claims for compensation for taking their property for public use. Congress in effect agreed to pay all damages they have suffered on condition that the decree of the court should cancel Shoshones titles to their property claimed by the terms of the treaty. The terms may have been harsh, but just compensation is to be fixed in the damages to compensate. Therefore the presumption is that Congress intended to do justice to its wards and that the courts would award damages that would amount to that just compensation contemplated by the Constitution.

EFFECT OF THE ACT OF 1883.

(2) In reference to the statements of defendant's counsel concerning the intention of Congress in passing the act of March 3, 1883 (Brief, 32, 33), it may be pointed out that Congress as far back as 1871 in the Stockbridge-Munsee case indicated its policy toward the ownership of natural resources on Indian reservations, and such policy, notwithstanding the alleged large amount involved, has been consistently adhered to up to the present. The statement of counsel that Congress was not aware of the effect of the act of 1883 is disproved by the passage of a large number of subsequent acts doing exactly what was provided in the act of 1883. That policy is and no doubt has always been that the United States never intended to deprive the Indians of any part of their patrimony. It was a policy

based on right and justice, and the amount involved had no bearing or influence on Congress in adopting and continuing such policy. It is to be observed that Government counsel in their brief have wholly ignored the legislation of Congress on the subject as set forth by Mr. Attorney General Stone in his opinion and in petitioner's brief.

Counsel for the defendant on page 31 of their brief quote the act of 1883, which provided that the proceeds of all pasturage and sales of timber, coal and other products, should be placed to the credit of Indian tribes; and say on page 32 there was no authority to remove and sell.

The question arises, how could there be sale without removal? This act impliedly gives the Secretary of the Interior power of removal (removal being merely an administrative act), if the Commissioner and the Secretary had no such general authority by virtue of having charge of all Indian affairs, and as guardian of the Indians.

On page 32 counsel say that when the act of March 3, 1883 was passed it was well known Indian reservations contained valuable stands of timber and large and rich mineral deposits, proved later to be worth hundreds of millions of dollars.

Does counsel imply, if such resources were known, that Congress was ignorant of such fact? If Congress was ignorant, then as it had provided in said act the Secretary shall make detail report at its next session it became fully aware of the effects of said act of 1883; still Congress did not repeal said act, but on the contrary at nearly every session passed additional acts confirming the proceeds from the natural resources on Indian reservations in the Indians.

On page 34 counsel state that "it is apparent that Congress did not understand the act of 1883 as conferring upon the Indian tribe any title to the timber, minerals, or other products of the reservation, since by the act of February 16, 1889, it was provided the President might authorize individual Indians residing on reservations to fell, cut, remove, sell or otherwise dispose of the dead timber

standing or fallen for the sole benefit of the individual Indians performing the labor."

The answer to this contention is, that as Congress had recognized the right to the timber, etc., in the Indian tribes, and the tribe under the supervision of the Secretary had the right to the proceeds arising from its sale; nevertheless in order to give employment to individual Indians, and whose individual labor produced the results, Congress considered it wise to encourage such thrift so far as dead timber was concerned. This act of 1889 was merely a subsidiary act to the act of 1883, and in passing it Congress undoubtedly conformed to the wishes of the tribes in the matter. After six years of experience under the act of 1883 Congress must have been aware of the effects of the said act, so reported to it by the President or the Secretary of the Interior. Under the plenary power of Congress over the Indians it had the power to supplement the act of 1883 without the consent of the tribe, but in all these matters it is well known that the Secretary or the Commissioner advises with the tribes before recommending legislation such as the act of 1889.

In 1787 it was ordained by the United States in Congress assembled, That—

> "The utmost good faith shall always be observed towards the Indians; their lands and property shall never be taken from them without their consent; and in their property, rights and liberty, they never shall be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall from time to time be made for preventing wrongs being done to them, and for preserving peace and friendship with them." (1 Stat. 52—4 Kappler, 1065.)

No instance can be cited by defendant's counsel where the Congress ever attempted to take for the use and benefit of the United States any natural resource located or found

on the lands of any Indian treaty reservation without adequate compensation therefor. In every instance, so far as counsel for the Shoshones are aware, Congress conceded to the Indians every element of value on such reservations, and has never gone to the extent of claiming by reason of its sovereign pre-emption right to purchase that such right of purchase included ownership of the land or the natural resources above and below the surface thereon. If the United States as the holder of the naked fee, or as Chief Justice Marshall said, as the holder of "the exclusive right of purchasing such lands as the natives were willing to sell", owned every element of value on such reservations outside of use and occupation, then Congress has never asserted such rights of ownership. All that Congress has reserved to itself is the right to say when and to whom said natural resources shall be disposed of, and to see the Indians are not overreached; and it acquired this right because of its sovereignty and as the guardian and trustee for the Indians, and also to see that "the sale of the land is not made to any other Governments or their subjects" (*Holden* v. *Joy*, 17 Wall. 211, 244). All these attributes of power and supervision over the Indians lodged in the United States are not inconsistent with the beneficial ownership of all elements of value contained within their reservation boundaries being in the Indians.

The United States has exacted its consent to the removal and disposal of natural resources on Indian reservations, as general guardian of the Indians, not only as to reservations in which the Indians held the usual Indian title, but also as to reservations where the Indians held a fee simple title. Congress has passed many acts governing the removal, sale and disposal of the natural resources on the reservations of the Five Civilized Tribes (32 Stat. 641) and other tribes holding their lands by patent. In this respect Congress has not distinguished between the nature of titles held, and in no instance so far as is known has Congress claimed any ownership whatever in the natural resources

of either kind of reservations. Congress has plenary power over the tribal property of the Indian tribes, which as interpreted by Congress itself, includes lands and resources. Such interpretation is conclusively shown by the many general and special acts enumerated in the appendix to petitioner's brief, pages 75, 76. These acts and the early treaties mentioned by Mr. Attorney General Stone in his Opinion cited on pages 65-68 of petitioner's brief, clearly indicate that the beneficial ownership of the natural resources on Indian reservations exists and always has existed in the Indians, and the acts and treaties above referred to are simply reaffirmations of such beneficial ownership. All that the Congress ever claimed was its stewardship over the property of the Indians; it has never asserted the right to go upon such reservations and denude their resources for the benefit of the United States; it has always adhered to the declaration enunciated in the Ordinance of 1787, above quoted, and all its acts since that declaration has been to the effect that the United States neither claims nor seeks profit at the expense of the Indians.

In the earlier days when the intention of Congress regarding the property rights of Indians in their reservation lands had not been fully expressed, this Court said:

> *Leavenworth R. R. Co.* v. *United States*, 92 U. S. 733-742:
>
> "In the exercise of their choice, they (Indians) might occupy their lands forever."
>
> *Lone Wolf* v. *Hitchcock*, 187 U. S., 554:
>
> Indian possession has always been recognized as complete and conclusive until terminated by conquest or by the exercise of that plenary power of guardianship to dispose of tribal property of the Nation's wards without their consent.
>
> *Holden* v. *Joy*, 17 Wall. 211-244:
>
> Unmistakably their (Indian) title was absolute, subject only to the preemption right of purchase acquired

by the United States as the successors of Great Britain and the right to prohibit the sale of the lands to any other governments or their subjects.

Mitchel v. *United States*, 9 Pet. 756—15 Pet. 84:

The right of the Indians to their lands is not that of mere occupancy and perpetual possession, but a right of property held under the guaranty of treaties.

Fellows v. *Denniston*, 5 Wall. 761:

It has already been shown that the United States have acknowledged the reservations to be the property of the Seneca Nation—that they will never claim them nor disturb this nation in their free use and enjoyment, and that they shall remain theirs until they choose to sell them. These are the guaranties given by the United States, and which her faith is pledged to uphold.

The Shoshone Indians, always the staunch friend and ally of the United States, place their hope in this Court to declare, in view of the consistent policy of Congress towards the Indians in reference to the ownership of the natural resources on Indian reservations, that they are and always have been, but particularly since the making of their treaty in 1868, the owners of the soil and resources embraced within their reservation boundaries, subject to the right of the United States to purchase and to act as trustee for the tribe.

GRATUITIES.

(3) Defendant's counsel on page 37 of brief are now for the first time attempting to show that any money received by the Shoshones from the proceeds of the sale of natural resources on their treaty reservation under the act of 1883, are reimbursable to the Government under "gratuities" allowed to be set-off by the Jurisdictional Act. No such novel proposition was advanced in the Court below. Such

a contention is contrary to the intention of Congress as expressed in Indian jurisdictional acts as well as in enunciations by the courts.

In the Fort Berthold case, decided Dec. 1, 1930, 71 Ct. Cl. 308, Chief Justice Booth said:

> "The sums chargeable, we think, must be restricted to the usually recognized and customary distributions made to the Indians as tribes and bands, unless a contrary purpose is expressed in the act."

In the Blackfeet case, the Court of Claims said:

> We are of the opinion that in this case it was the intent and purpose of Congress to charge the plaintiffs with all sums disbursed for their benefit over and above those provided for in treaty or other obligations. (81 Ct. Cl. 101.)

Counsel for the Government in Indian cases before the Court of Claims, have defined gratuities to be all sums advanced or expended by the United States from the Treasury for the benefit of the Indians, although under no obligation to do so; and this definition has been adopted by the Court of Claims. (81 Ct. Cl., 268.)

For Congress or the courts to say that money arising from the removal and sale of natural products on Indian treaty reservations when Congress has expressly provided such money should be placed to the credit of the Indians or expended for their benefit, same not being United States funds, is a set-off would make the repeated declarations to treat the Indian fairly and justly a hollow mockery; and as stated by the Court of Claims in *White River Utes* v. *The United States,* "Certainly no such claim would ever be made against any people other than Indians." (45 Ct. Cl., 440.)

As stated by this Court in *Choctaw Nation* v. *The United States,* 119 U. S., 1—

"The parties are not on an equal footing and that inequality is to be made good by the superior justice which looks only to the substance of the right without regard to technical rules."

INCONSISTENCIES OF DEFENDANT'S COUNSEL.

(4) It is striking to note that present counsel for the defendant have practically abandoned defenses set up in the Court below as well in their brief in support of petition for certiorari in this Court, and are now seeking to raise entirely new defenses.

In the court below counsel did not attack the wording of the Jurisdictional Act, nor contend that parts of it were ambiguous. Now counsel are attempting to show this Court by quoting (brief, pp. 20-23) certain words Congress omitted in Section 3 thereof which were contained in the earlier bill, namely S. 2301, that an ambiguity was created by such omission as to what Congress intended, overlooking the fact that the first section of the Jurisdictional Act as approved confers complete jurisdiction upon the Court of Claims, and on appeal to the Supreme Court, to adjudicate the claims of the Shoshone Indians against the United States and to render judgment therein. While it may be admitted that Congress might have added additional words to Sec. 3, such as "so appropriated" at the end of Sec. 3, notwithstanding such words are plainly inferred, to meet the critical objection raised by counsel, nevertheless when Section 1 and 3 are read together, it will be seen that the intention of Congress was plain, namely: that in the event of judgment, the damages awarded and paid thereunder shall annul and cancel all claim, right and title of the said Shoshone Indians in and to the lands or property appropriated by the United States.

In any event, should there be doubt as to the intention of Congress, this court in *Choate* v. *Trapp,* 224 U. S., 665, has said:

"Doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor

> of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith. This rule of construction has been recognized, without exception, for more than a hundred years, and has been applied in tax cases."

Also see *Alaska-Pacific Fisheries* v. *United States*, 248 U. S. 78-89.

Reference is here made to the Jurisdictional Acts in the case of the Iowa Tribe of Indians, approved April 28, 1920 (41 Stat. 585), and the case of the Fort Berthold Indians, approved February 11, 1920 (41 Stat. 404), in both of which cases the Court of Claims rendered judgments in favor of the Indians under the first section contained in both acts, which first section is nearly identical with the first section of the Shoshone Act. (68 Ct. Cl., 585; 71 Ct. Cl., 308.)

In the Court below defendant made its defense on the theory that the Shoshone Indians had consented to the admission of the Arapahoes amongst them, and had surrendered to the Arapahoes one-half interest in their treaty reservation without consideration. Abandoning this contention in this Court, they now say in the cross-petition, pages 10-11:

> "Those in charge of Indian Affairs *thought* they had the consent of the Shoshones to the removal of the Arapahoes for permanent settlement on the Shoshone reservation;"

and upon such "thought" counsel claim the date of "taking" was in 1878.

In the Court below and in the cross-petition here, defendant contended that Congress, by passing appropriations for the support of the Arapahoes, had recognized the taking of Shoshone lands. In the brief filed December 10, this position is abandoned.

In this brief, counsel for defendant abandon the above defenses, and boldly assert that the "taking" was in 1878,

basing their claim on a Congressional report which merely recited "that the northern band of the Arapahoes, under military escort, were moved upon said reservation in the winter of 1877-78" (brief, page 18); that the Jurisdictional Act is ambiguous or meaningless (p. 29); that the Jurisdictional Act was "an offer to purchase," or "an offer to contract" (pp. 20, 28) and then say that the Jurisdictional Act provided "only a forum" (p. 26); that "the bill undertook to fix the compensation to be paid," (p. 23) whereas the Act left that function to the Courts; that money arising from sale of natural resources from the Shoshone reservation and placed to the credit of or expended for their benefit as authorized by Congress, is a set-off as a gratuity; and that the Court below found no actual damages to the Shoshones notwithstanding it found the United States had deprived the Shoshones of one-half interest in their reservation, fixed the value thereof, and awarded judgment.

This Court has met such a change of front and inconsistency in its opinion written by Mr. Justice Holmes in *International Paper* v. *The United States*, 282 U. S., 399, as follows:

> "The Government has urged different defenses with varying energy at different stages of the case. The latest to be pressed is that it does not appear that the action of the Secretary was authorized by Congress. We shall give scant consideration to such a repudiation of responsibility."

Respectfully submitted,

THE SHOSHONE TRIBE OF INDIANS OF THE WIND RIVER RESERVATION IN WYOMING,

By GEORGE M. TUNISON,
Counsel for Shoshone Tribe.

CHARLES J. KAPPLER,
ALBERT W. JEFFERIES,
FRANCIS S. HOWELL,
Of Counsel.

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In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 216

THE SHOSHONE TRIBE OF INDIANS OF THE WIND RIVER RESERVATION IN WYOMING, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims (R. 69–97) is not yet reported.

JURISDICTION

The judgment sought to be reviewed was entered December 2, 1935 (R. 97). Motions for a new trial and amendment of findings were denied June 1, 1936 (R. 98–100). The petition for a writ of certiorari was filed July 22, 1936 (R. 100). The jurisdiction of this Court is invoked under Section 1 of the Act of March 3, 1927, c. 302, 44 Stat. 1349, and

Section 3 (b) of the Act of February 13, 1925, c. 229, 43 Stat. 936, 939 (U. S. C., Title 28, Sec. 288).

QUESTIONS PRESENTED

1. Whether the permanent taking of an undivided one-half interest in the Shoshone Indian Reservation by the Government for the benefit of the Northern Arapahoe Indians occurred in 1927 upon the passage of the Jurisdictional Act of March 3, 1927, and the filing of this suit thereunder by the Shoshone Tribe.

2. Whether the Shoshones are entitled to interest upon the value of the interest in the reservation permanently taken for the benefit of the Arapahoes and upon the value of the alleged temporary use and occupancy of the reservation by the Arapahoes.

3. Whether the court below erred, as a matter of law, in its determination of the value of the alleged temporary use and occupancy of the reservation by the Arapahoes.

TREATIES AND STATUTES INVOLVED

Reference to the pertinent statutory and treaty provisions will be found in the cross-petition filed by the Government in this case as No. 328, which will, of course, be submitted simultaneously with the instant petition.

STATEMENT

A summary of the pertinent facts as found by the Court of Claims is made in the Government's

cross-petition, to which the Court is respectfully referred.

DISCUSSION

The Court of Claims held that the date of permanent taking of an undivided one-half interest in the Shoshone Reservation for the benefit of the Arapahoes occurred on August 13, 1891, when the Commissioner of Indian Affairs advised the Woodruff Commission by letter "that the Arapahoes have equal rights to the land on the said reservation which does not depend upon the further consent of the Shoshones" (R. 75). The petitioner contends that, for various reasons, this letter or "holding" of August 13, 1891, was "of no legal efficacy so far as concerned a permanent taking of any interest in the Shoshone Treaty Reservation lands" (Br. 25). In its cross-petition for writ of certiorari (No. 328), to which the Court is respectfully referred, the Government agrees with this conclusion but upon different grounds, and it contends that the true date of taking was in 1878 when the Government, without the consent of the Shoshones, placed the Arapahoes upon the Shoshone Reservation and thereafter continually kept them there over the objection and protest of the Shoshones. The petitioner contends, however, that the date of taking occurred in 1927 when the Jurisdictional Act of March 3, 1927, was passed and this suit was filed thereunder by the Shoshones. While we are of the opinion that the court below was correct in holding that the Jurisdictional Act did not

effect a taking by the Government (R. 77–78) and that, as that court said, "Its intent and purpose * * * was only to provide a forum in which the claims of the plaintiff tribe against the United States could be heard and adjudicated",[1] we do not oppose the granting of a writ of certiorari upon this question to the end that the Court may have before it all phases of the question as to the correct date of taking if it should decide to review that question.

II

We submit that the court below was clearly correct in holding that the petitioner was not entitled to an award of interest either upon the value of the interest in the reservation which was permanently taken by the Government on behalf of the Arapahoes or upon the value of the alleged temporary use and occupancy of the reservation by the Arapahoes (R. 93–95).[2]

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[1] See also in support of the court's conclusion the cases of *United States* v. *Mille Lac Chippewas*, 229 U. S. 498, 500; *Klamath Indians* v. *United States*, 296 U. S. 244, 250, 251.

[2] The question of the allowance of interest upon the value of the alleged temporary use and occupancy by the Arapahoes of the Shoshone Reservation would, of course, be removed from the case if the Court should hold, as contended by the Government, that the taking was in 1878 instead of in 1891, as held by the court below, or in 1927, as urged by the petitioner herein.

Properly viewed, this is a suit based upon a violation by the United States of Article 2 of the Treaty of July 3, 1868, guaranteeing the Shoshone Tribe the exclusive use and occupancy of their reservation. In other words, it is in essence a suit for breach of contract. Section 177 of the Judicial Code (U. S. C., Title 28, Sec. 284) provides that "No interest shall be allowed on any claim up to the time of the rendition of judgment thereon by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest." Inasmuch as the treaty makes no provision for the payment of any interest upon damages for violation of its provisions, Section 177 applies unless there is something in the Jurisdictional Act of March 3, 1927, under which this suit was brought, taking the case out of the operation of the statute. That there is no provision in this statute which may be construed as permitting the allowance of interest is evident from the analysis of the statute and the pertinent decisions made by the court below. The cases relied upon by the petitioner are not in point for the reason that they involved either the exercise of the power of eminent domain or were suits for damages under statutes which specifically authorized the payment of *just* or *entire* compensation, which is not the situation presented by this case. The case of *Yankton Sioux*

Tribe of Indians v. *United States*, 272 U. S. 351, 65 C. Cls. 427, also involved a taking under the power of eminent domain because the taking was pursuant to specific Congressional authorization (272 U. S. 354). As there does not appear to be any substantial doubt as to the correctness of the holding of the court below upon the interest question, there would seem to be no necessity for the issuance of a writ of certiorari to review that question.

III

For the alleged temporary use and occupancy of the reservation by the Arapahoes during the period between 1878 and 1891, the date as of which the court below held that the permanent taking occurred, an allowance of $332,475, or $25,575 for each of the 13 years, was made. This was at the rate of $25 a year for each of the Arapahoes who was on the reservation during this period. The court found that this amount was "fair and reasonable in the circumstances" (R. 82). The petitioner contends that the amount awarded should have been at least $1,066,000, or $82,000 a year, which would have been at the rate of about $82 a year for each Indian[3] (Br. 26). The argument

[3] The question of the proper amount to be awarded for the alleged temporary use and occupancy of the reservation by the Arapahoes for the period between 1878 and 1891 is, of course, only of materiality in the event this Court should

of inadequacy arises apparently from the fact that the court awarded $2,050,597.50 as the value of the undivided one-half interest which it held was permanently taken as of 1891. But, obviously, this value, which was practically the fee value, could have no decisive bearing upon the amount properly awardable during each of the 13 preceding years for a mere temporary interference with the right to use and occupy the reservation.

The court below arrived at its determination of the fair and reasonable value of the temporary use and occupancy of the reservation by the Arapahoes by considering the benefits accruing to the Government and the Arapahoes and the damages sustained by the Shoshones because of such temporary use and occupancy, and after considering these elements it found the per capita value of the right temporarily to use and occupy the reservation on the basis of the average annual population of the Arapahoe Tribe on the reservation during the 13-year period. Obviously, such a determination in-

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hold that the permanent taking occurred, as decided below, in 1891.

Because of its position that the taking occurred in 1927, the petitioner also makes the incidental contention that it should be awarded an allowance for the temporary use and occupancy of the reservation not only for the period between 1878 and 1891 but also from 1891 to 1927. Discussion of this question in advance of determination by this Court of the correct date of permanent taking would, of course, be premature.

volved the resolving of questions of fact which, of course, this Court will not attempt to review. The issuance of a writ of certiorari with reference to this point would, consequently, seem not to be required.

Respectfully submitted.

STANLEY REED,
Solicitor General.
HARRY W. BLAIR,
Assistant Attorney General.
GEORGE T. STORMONT,
CHARLES H. SMALL,
W. MARVIN SMITH,
Attorneys.

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In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 216

SHOSHONE TRIBE OF INDIANS OF THE WIND RIVER RESERVATION IN WYOMING, PETITIONER

v.

THE UNITED STATES

No. 328

THE UNITED STATES, PETITIONER

v.

SHOSHONE TRIBE OF INDIANS OF THE WIND RIVER RESERVATION IN WYOMING

ON WRITS OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims (R. 69–97) has not yet been reported. The memorandum and order of the Court of Claims overruling the motions

of both parties for new trial and for amendment of findings appears at pages 98 to 100 of the Record.

JURISDICTION

The judgment of the Court of Claims was entered December 2, 1935 (R. 97). Motions of both parties for new trial and amendment of findings were overruled June 1, 1936 (R. 98–100). The petition of the Shoshone Tribe of Indians for a writ of certiorari was filed July 22, 1936, and the cross-petition of the United States was filed September 1, 1936. Both petitions were granted on October 19, 1936. The jurisdiction of this Court is conferred by Section 1 of the Act of March 3, 1927, c. 302, 44 Stat., Part 2, page 1349, and by Section 3 (b) of the Act of February 13, 1925, c. 229, 43 Stat. 936, 939 (U. S. C., Title 28, Sec. 288).

QUESTIONS PRESENTED

The questions presented in this case may be summarized as follows:

1. Whether the placing of the Northern Arapahoes upon the Shoshone Reservation without the consent of the Shoshones and the continued maintenance of them there over the objection and protests of the Shoshones constituted an appropriation in 1878 of an undivided one-half of the Shoshones' interest in the reservation.

2. Whether the letter of August 13, 1891, from the Commissioner of Indian Affairs to the Wood-

ruff Commission constituted a "taking" as of that date as held by the Court of Claims.

3. Whether the passage of the Jurisdictional Act of 1927 and the bringing of this suit thereunder constituted an exercise of the power of eminent domain by the United States.

4. Whether the Act of March 3, 1883, conferred any rights upon the Shoshones for which they are entitled to recover compensation in this suit.

5. Whether the court below made an adequate allowance of compensation for the alleged temporary use and occupancy of the reservation by the Arapahoes from 1878 to 1891.

6. Whether the court below should have allowed compensation as for a temporary use and occupancy of the reservation by the Arapahoes for the periods from 1878 to 1891 and 1891 to 1927.

7. Whether the Shoshones should be allowed interest upon any compensation which they may be entitled to recover.

TREATY AND STATUTES INVOLVED

In the Appendix at pages 42 to 50, respectively, there are printed the Treaty of July 3, 1868 (15 Stat. 673), the pertinent portion of the Act of March 3, 1883, c. 141, 22 Stat. 582, 590 (U. S. C., Title 25, Sec. 155), and the full text of the Jurisdictional Act of March 3, 1927, c. 302, 44 Stat., Part 2, page 1349.

STATEMENT

The controlling facts of this case as shown by the record (pp. 31–68) are as follows:

On July 2, 1863, the United States and the Shoshone Tribe of Indians entered into a treaty (18 Stat. 685) by which a reservation of 44,672,000 acres of land located in Colorado, Utah, Idaho, and Wyoming was set apart for the Shoshones.

By a treaty of July 3, 1868, 15 Stat. 673, the Shoshones relinquished that reservation to the United States and the United States agreed (Art. II) that a certain tract of land, containing 3,054,182 acres, which is now within the State of Wyoming, should be and was thereby "* * * set apart for the absolute and undisturbed use and occupation of the Shoshone Indians herein named, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them; and * * * that no persons except those herein designated and authorized so to do, and except such officers, agents, and employees of the Government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall be permitted to pass over, settle upon, or reside in the territory * * *" set apart for the Shoshones. The Shoshones went upon the land immediately thereafter and have remained there ever since (R. 33, 36).

About October 1, 1877, a delegation of Sioux and Arapahoe Indians conferred with the President

and the Commissioner of Indian Affairs in an effort to arrange the location of their respective tribes upon some reservation. One Irwin, who had been an agent for the Shoshones but who was then the Indian Agent at the Red Cloud Agency, which had supervision over the Northern Band of the Arapahoe Indians, was present at the conference (R. 43, 44).

Afterwards, and on October 4, 1877, the Commissioner of Indian Affairs, with the approval of the Secretary of the Interior, authorized and directed Irwin to proceed at once to the Shoshone Reservation and to consult with the Indians there for the purpose of gaining their consent to the placing of the Northern Arapahoes upon the Shoshone Reservation with both tribes under one agent (R. 44). Irwin went to the Shoshone Reservation, held a council with the Indians there (R. 44–45), and then sent a telegram to the Commissioner of Indian Affairs at Washington dated Cheyenne, Wyoming, October 17, 1877, as follows (R. 45–46):

"I returned from Shoshone Agency today. Held council and made peace between Shoshones and Arapahoes."

The annual report of the Commissioner of Indian Affairs, dated November 1, 1877, stated in substance that in accordance with their request the Arapahoes had been given permission to join the Shoshones on their reservation, that the Shoshones in a formal council with Irwin had con-

sented to the arrangement and that the removal of the Arapahoes was then in progress (R. 74). As a matter of fact Irwin did not ask the Shoshones to agree to admit the Arapahoes upon their reservation, either temporarily or permanently, and up to the time of the institution of this suit the Shoshones never had consented to admit the Arapahoes as permanent occupants of their reservation (R. 45). The error in his annual report was called to the attention of the Commissioner of Indian Affairs as early as February 21, 1878, when one Patten, who was the agent for the Shoshones, wrote to the Commissioner and advised him that in the council with Irwin the Shoshones had not consented to admit the Arapahoes (R. 47), and the Court of Claims stated in its opinion that the trial record is replete with protests by the Shoshones against the presence of the Arapahoes upon their reservation from the time they were brought there in 1878 until the present (R. 73).

During the early part of 1878 the Arapahoes were being moved to the Shoshone Reservation under military escort (R. 47). On March 18, 1878, some of the Arapahoes arrived there without any previous knowledge on the part of the Shoshones of their coming, and their arrival caused considerable excitement among the Shoshones, resulting in demonstrations in the Shoshones' village which frightened the Arapahoes. On the same day Patten telegraphed the Commissioner of Indian

Affairs for immediate instructions. On April 2, 1878, the Commissioner replied and instructed Patten to "report fully by mail what other measures are necessary to locate the Band of Northern Arapahoe Indians under Black Coal" (R. 47). In the meantime the Arapahoes sent a delegation to the Shoshone Agency, where they met a number of the Shoshones and their Chief, Washakie. The Arapahoes explained to Chief Washakie that their horses and their traveling equipment were in bad condition; that many of their number were sick; and that for other similar reasons they were unable to travel. They also explained that they understood that the Government was preparing a reservation for them and that they would go there as soon as possible. Chief Washakie then informed the Arapahoe delegation that their tribe might come upon the Shoshone Reservation and remain there for a short time to rest and to feed their horses. The matter of the permanent settlement of the Arapahoes upon the Shoshone Reservation was not mentioned at that conference (R. 47, 48). By April 8, 1878, most of the Arapahoes were on the Shoshone Reservation (R. 48), and they have remained there and used and occupied the reservation and received the benefits of all facilities and services equally with the Shoshones ever since (R. 50). After the Arapahoes had camped upon the reservation, fed their horses, and been furnished with food and supplies by the agency for

several months, the Shoshone Tribe began to protest to the agent against their continued presence and such protests were continued and were mentioned from time to time in the reports of the Indian Agency to the Commissioner of Indian Affairs, but no action thereon was ever taken (R. 49).

Sometime before August 13, 1891, a Commission known as the Woodruff Commission was sent to negotiate on behalf of the United States with the Indians of the Shoshone Reservation for a cession of such part thereof as the Indians would cede. On August 5, 1891, the chairman of the Commission wrote to the Commissioner of Indian Affairs, asking for instructions as to how the Commission should treat with the Indians, inasmuch as Chief Washakie and the Shoshones denied that the Arapahoes had any rights to or upon the reservation. In reply the Commissioner of Indian Affairs, by a letter dated August 13, 1891, advised the Commission that "this office holds * * * that the Arapahoes have equal rights to the land on the said reservation which does not depend upon the further consent of the Shoshones, and you should conduct your negotiations with them upon that basis and with that understanding" (R. 50). The Commission continued its negotiations and obtained an agreement with the Indians, but that agreement was never ratified and the cession was never made (R. 52).

Subsequently, by agreement of April 21, 1896, approved June 7, 1897, c. 3, 30 Stat. 62, the Sho-

shones and the Arapahoes ceded to the United States 55,040 acres of the reservation for a consideration of $60,000. Again by agreement of April 21, 1904, approved March 3, 1905, c. 1452, 33 Stat. 1016, the Shoshones and the Arapahoes ceded to the United States a part of the reservation, containing 1,480,000 acres, which the United States agreed to dispose of for the account of the Indians belonging on the reservation. Each of these agreements contained a stipulation to the effect that nothing therein should be construed to deprive the Indians of any annuities or benefits to which they were entitled under existing agreements or treaty stipulations (R. 52, 53).

By the Jurisdictional Act of March 3, 1927, c. 302, 44 Stat. 1349, Congress conferred jurisdiction on the Court of Claims to hear, examine, adjudicate, and render judgment in any and all legal and equitable claims which the Shoshone Tribe might have against the United States arising under or growing out of the Treaty of July 3, 1868, or arising under or growing out of any subsequent treaty or agreement between the Shoshone Tribe and the United States or any subsequent Act of Congress affecting the tribe which had not theretofore been determined and adjudicated upon their merits by the Court of Claims or this Court. The Act also provided that any payment, including gratuities, which the United States might have made to the tribe should not operate as an estoppel but might be pleaded as an offset in the suit. Section 3 of

the Act also provided in part that "in reference to all claims which may be the subject matter of the suits herein authorized, the decree of the court shall be in full settlement of all damages, if any, committed by the Government of the United States and shall annul and cancel all claim, right, and title of the said Shoshone Indians in and to such money, lands, or other property" (R. 3). This suit was brought under that Act.

The Court of Claims held that the United States was liable for $332,475 as the fair and reasonable value of the use and occupation of the reservation by the Arapahoes from March 18, 1878, to August 13, 1891, and that on August 13, 1891, by the letter of the Commissioner of Indian Affairs to the Woodruff Commission the United States had "taken" an undivided one-half interest in the reservation and therefore was liable for the value of the interest "taken" as of the date of "taking" (R. 53; 74, 76). The court found that the fair and reasonable value of an undivided one-half interest of the Shoshone Reservation on August 13, 1891, was $2,050,579.50 (R. 53), based upon a valuation of $1.75 per acre (R. 79). The findings and the opinion show that this determination of value was based upon the facts that "it was known in 1891 that the Shoshone Reservation contained a large but undetermined quantity of coal, oil and gas, phosphate, and gypsum" (R. 53), and because it contained a large stand of excellent timber and a large area of fine grazing land from which con-

siderable revenue was derived from grazing leases (R. 38, 39, 79). The opinion shows that the court included these elements of value in fixing its award because of the Act of March 3, 1883, c. 141, 22 Stat. 582, 590, which provided in part that "the proceeds of all pasturage and sales of timber, coal, or other product of any Indian Reservation, * * *' and not the result of the labor of any member of such tribe, shall be covered into the Treasury for the benefit of such tribe under such regulations as the Secretary of the Interior shall prescribe; * * *'" (R. 79), and which the court regarded as making the Shoshones the "legal or beneficial owners of the mineral rights", timber, and pasturage, in addition to the rights given them by the Treaty of 1868 (R. 89; see also R. 78, 79, 81, 83, 87).

Against these and other items the court allowed offsets which left a balance due the Shoshones of $793,821.49 (R. 69), for which the court entered judgment (R. 97). Both parties filed motions for new trial and amendment of findings which were denied (R. 97, 100), and the case comes to this Court on cross-writs of certiorari.

SPECIFICATIONS OF ERRORS TO BE URGED BY THE UNITED STATES

The court below erred:

1. In holding that there was a "taking" by the Government of an undivided one-half interest in the Shoshone reservation for the benefit of the Arapahoes when the Commissioner of Indian Af-

fairs on August 13, 1891, advised the Woodruff Commission that the Arapahoes had equal rights in the reservation which did not depend upon the further consent of the Shoshones.

2. In not holding that the "taking" occurred in 1878 when the Arapahoes were removed by the Government to the Shoshone reservation without the consent of the Shoshones and thereafter maintained there over the continued objection and protest of the Shoshones.

3. In holding that the Act of March 3, 1883, granted the Shoshones an interest in and to the reservation in addition to those interests which were granted by the Treaty of 1868.

SUMMARY OF ARGUMENT

I

The letter of August 13, 1891, from the Commissioner of Indian Affairs to the Woodruff Commission did not constitute a "taking" in any sense because it was a mere expression of his opinion as to the legal effect of what had taken place thirteen years before. It was not intended to effect a "taking", and such "taking" as there is in this case had been completed in 1878, thirteen years before the letter was written.

The "taking", in the sense in which the Court of Claims used the term, was complete in 1878 when the Commissioner of Indian Affairs failed to remove the Arapahoes from the Shoshones' reservation, although he had full knowledge of the

fact that the occupancy of the Shoshones' reservation by the Arapahoes was being continued without the consent of the Shoshones and over their protests in violation of the Treaty of 1868.

The legislative history of the Jurisdictional Act in this case shows that it should be construed as permitting the Shoshone Indians to sue in the Court of Claims, upon the conditions that if they should so elect and the Court of Claims should find that there had been any unlawful appropriation of their reservation or any part thereof, it should award the Shoshones the value of the land appropriated as of the time of the appropriation but without interest thereon, and that the decree of the court should cancel and annul the right and title of the Shoshones to the lands so appropriated unlawfully.

The contention of the Shoshones that the Jurisdictional Act should be construed as depriving them of an interest in their reservation through the exercise of the power of eminent domain is without merit because (1) the Act permits the Shoshones to elect to preserve their rights and title without impairment by declining to sue, (2) the Act contains provisions which, if included in an Act exercising the power of eminent domain, would be unconstitutional, and (3) Section 3 of the Act provides that the "decree of the court shall be in full settlement of all damages, *if any*", which clearly indicates that Congress had no idea that it was creating an obligation on the part of the

United States although an obligation to pay "just compensation" necessarily results from the exercise of the power of eminent domain.

If the legislative history of the Jurisdictional Act be disregarded it is impossible to give meaning to that part of the Act which provides that the "decree of the court * * * shall annul and cancel all claim, right, and title of the said Shoshone Indians in and to such money, lands, or other property" and the effect of the Jurisdictional Act is limited to providing a forum for the adjudication of preexisting claims. If the Act be so construed, the Shoshones would be entitled to recover only for actual damages which they sustained by reason of the violation of the Treaty of 1868. There are no findings of the court below from which it can be ascertained what damages, if any, the Shoshones sustained thereby.

II

It is clear from the language of the Act of March 3, 1883, that standing by itself and in the absence of other legislation it granted to the Shoshones no greater rights in the timber, minerals, and other products of their reservation than they had under the Treaty of 1868. If there were any possible doubt as to the correct construction of that Act, consideration of the circumstances surrounding its passage makes it clear that Congress did not intend it to operate as a grant. The most that can be said in support of the contention that the Act operated

as a grant is that its language is ambiguous, but it is well-settled that it is enough to deny the contention if upon considering the Act the mind rests in doubt and uncertainty as to whether a grant was intended. Later legislation shows that Congress did not understand the Act of 1883 as a grant. Moreover, it would seem that it was unnecessary for the Court of Claims to construe the Act of March 3, 1883, at all. If that Act did grant anything to the Indians, what it granted was obviously a gratuity, and under the Jurisdictional Act the United States is entitled to offset gratuities against any claims which the Indians may have against the United States. Therefore, it necessarily follows that any claim for the appropriation of the gratuity bestowed would be offset by its own value.

III

The discussion of the remaining points is too brief to require summarization.

ARGUMENT

I

THE LIABILITY OF THE UNITED STATES TO THE SHOSHONES IS LIMITED TO ONE-HALF OF THE VALUE OF THEIR INTEREST IN THE RESERVATION AS OF 1878, WITHOUT INTEREST THEREON

The Court of Claims held that by the letter dated August 3, 1891, from the Commissioner of Indian Affairs to the Woodruff Commission in which it was stated that "this office holds * * * that the Arapahoes have equal rights to the land on the

said reservation which does not depend upon the further consent of the Shoshones" (R. 50, 75), the United States "took" an undivided one-half interest in the Shoshone Reservation and thereby became liable to the Shoshones for the value of the estate taken as of the date of taking, but without interest.

Both parties to this suit agree that the Court of Claims erred in so holding but disagree as to the conclusion which it should have reached. The Government contends that the court erred in fixing the date of the letter to be the date of the "taking." The date of the "taking" is of primary importance in determining the measure of damages to be awarded.

The letter of August 13, 1891, from the Commissioner of Indian Affairs to the Woodruff Commission did not constitute a "taking" in any sense. The Arapahoes had been placed on the Shoshones' Reservation in 1878 and kept there for 13 years without the consent and over the protest of the Shoshones. The Commissioner of Indian Affairs had been fully aware of the facts and had ignored the protests which the Shoshones had been making for many years. The power and authority of the Commissioner of Indian Affairs had not been enlarged during the time the Arapahoes had been kept there. His letter altered no fact; it did not change in any way the situation which had then existed 13 years and which continues unchanged to the present. It did not purport to "take"—and

there is nothing to show that it was intended to "take"—any interest from the Shoshones. The absence of any intention to "take" is in itself sufficient to refute the holding that the writing of the letter effected a "taking." *Horstmann Co.* v. *United States,* 257 U. S. 138. The letter was nothing but a statement by the Commissioner of Indian Affairs of his opinion of what the rights of the parties had been and should continue to be, and that opinion was based upon facts which had occurred 13 years before.

Under the facts of this case the "taking" in the sense in which the Court of Claims used the term was complete in 1878 when the Commissioner of Indian Affairs, with full knowledge of the fact that the Shoshones had consented to only a temporary occupancy of their Reservation by the Arapahoes, kept the Arapahoes on the Reservation over the protests of the Shoshones (R. 47–50). Those facts, and not the opinion which was expressed by the Commissioner of Indian Affairs in his letter to the Woodruff Commission, deprived the Shoshones of the exclusive use of their Reservation, constituted a violation of the Treaty of 1868, and effected whatever "taking" or appropriation is involved in this case.

That Congress understood these facts as constituting the appropriation for which the Jurisdictional Act was designed to afford the Shoshones relief, is shown by the legislative history of the

Jurisdictional Act. In reporting on a bill known as S. 2301, which, after veto by the President, was altered to the form in which the Jurisdictional Act now appears, the Committee on Indian Affairs of the House of Representatives said (Rep. No. 1628, 69th Congress, 2nd Session, Cong. Rec., Vol. 68, Part 1, p. 625):

> Despite the fact that the United States expressly guaranteed to these Indians the uninterrupted use and occupancy of the reservation, and against the protests of the Shoshones of said Wind River Reservation in Wyoming, the northern band of the Arapahoes, under military escort, were moved upon said reservation in the winter of 1877–78.
>
> In order to disarm the Shoshones they were assured by the military authorities that the Arapahoes would be removed from the reservation the following year. Since then the Shoshones have frequently protested against *the alleged unlawful appropriation* of their reservation but have received no relief from the Government. On the contrary, the Government has allowed the Arapahoes upon the reservation and treated the funds claimed by the Shoshones as though they were the joint property of both tribes.
>
> The purpose of the bill is to permit the Shoshones to submit their claims for alleged appropriation of property to the Court of Claims, and your committee feels that in

> view of the strong showing made the bill should be enacted at an early date. [Italics ours.]

For those reasons we submit that if the Court of Claims was correct in holding that there has been a "taking", it was in error in holding that the "taking" was in 1891 instead of 1878.

Both parties to this suit are agreed that there was no authority in the Commissioner of Indian Affairs to deprive the Shoshones of any property rights either in 1878 or in 1891. The only way in which the Shoshones could lawfully have been deprived of the use and occupation of their reservation was through the exercise of the power of eminent domain, *United States* v. *Creek Nation*, 295 U. S. 103, 110; but the Government will not be deemed to have exercised that power merely because some unauthorized officer takes possession of property, *United States* v. *North American Transportation & Trading Company*, 253 U. S. 330, 333.

The only color of authority for a "taking" in any sense by the Commissioner of Indian Affairs was Section 463 of the Revised Statutes (U. S. C., Title 25, Sec. 2), upon which the Court of Claims apparently based its conclusion (R. 76, 77). That statute provides:

> The commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs and of all matters arising out of Indian relations.

If the decision of the Court of Claims is to be understood as construing that statute as authorizing the Commissioner of Indian Affairs to exercise the power of eminent domain over Indian lands, we submit that such construction does violence to the language of the statute and it would seem that such an interpretation was denied by this Court in *United States* v. *Creek Nation*, 295 U. S. 103.

Since the action of the Commissioner of Indian Affairs was without authority Congress could have repudiated it altogether, and it would have created no liability on the part of the Government except as a breach of the Treaty. *J. Ribas y Hijo* v. *United States*, 194 U. S. 315, 323; *United States* v. *North American Transportation & Trading Company*, 253 U. S. 330, 334.

It is submitted, first, that instead of repudiating the action of the Commissioner, Congress by the Jurisdictional Act provided in effect that the "taking" or appropriation in 1878 should operate as an offer to purchase as of the date of the appropriation and left the Shoshones free to accept or reject that offer, and, second, that by filing this suit the Shoshones have elected to accept the offer and are bound by their acceptance.

In Section 3 of the Jurisdictional Act of March 3, 1927, Congress provided that—

> In reference to all claims which may be the subject-matter of the suits herein authorized, the decree of the court shall be in full

> settlement of all damages, if any, committed by the Government of the United States and shall annul and cancel all claim, right, and title of the said Shoshone Indians in and to *such money, lands, or other property.* [Italics ours.]

This reference to "such money, lands, or other property" is the first and only reference in the Act to any money, lands, or other property, so that from the face of the Act it is impossible to determine to what money, lands, or other property that provision of the Act applies, and to give it meaning we must look elsewhere for aid in its construction. This Court has declared that in case of ambiguity it may turn for assistance to the legislative history of the statute, *Costanzo* v. *Tillinghast,* 287 U. S. 341, 345. The legislative history of this Act makes the Congressional intent clear. The 69th Congress passed a bill known as S. 2301, which the President vetoed on January 28, 1927. Sections 1, 2, 4, 5, 6, and 7 of the Jurisdictional Act under which this suit was brought are identical with Sections 1, 2, 5, 6, 7, and 8 of that Bill. Sections 3 and 4 of that Bill provided (Cong. Rec., Vol. 68, Pt. 2, p. 1791):

> SEC. 3. In said suit the court shall also hear, examine, and adjudicate any claims which the United States may have against said tribe, but any payment, including gratuities which the United States may have made to said tribe, shall not operate as an estoppel, but may be pleaded as an offset in such suit: *Provided, however,* That the

United States may interpose to such suit or action any and all pleas of defense, affirmative and negative, legal and equitable, which it may have thereto not herein specifically barred by the provisions of this Act.

SEC. 4. *If it be determined by the court that the United States, in violation of the terms and provisions of any law, treaty, or agreement, has appropriated or disposed of any lands, money, or other property belonging to the Indians, damages therefor shall be confined to the value of the money, lands, or other property at the time of such appropriation or disposal, together with interest thereon at 5 per centum per annum from the date thereof;* and with reference to all claims which may be the subject matter of the suits herein authorized, the decree of the court shall be in full settlement of all damages, if any, committed by the Government of the United States and shall annul and cancel all claim, right, and title to the said Shoshone Indians in and to such money, lands, or other property. [Italics ours.]

The meaning of that bill was clear. It dealt with *appropriations*[1] of moneys, lands, or other property "in *violation* of the terms and provisions of any law, treaty, or agreement * * *" and provided expressly that "the *decree of the court* * * * shall annul and cancel all claim, right, and title of the said Shoshone

[1] The meaning of the term "appropriations" is made clear by the report on the Bill made by the House Committee on Indian Affairs, *supra*, p. 18.

Indians in and to such money, lands, or other property" so appropriated, and that the damages awarded by the decree should be confined to the value at the time of the appropriation and not at the date of the passage of the Bill. Since only the decree of the court would have annulled and cancelled any right or title of the Shoshone Indians, it is obvious that their rights and title could have been preserved by a refusal to bring suit, but by electing to take advantage of the benefits conferred upon them by the Bill they would have bound themselves to accept likewise the conditions imposed upon such acceptance, which included the annulling of their title and the limitation of the award to the value of the lands appropriated as of the date of the appropriation.

The fact that the Indians were given an election in the matter is sufficient to refute any contention that the vetoed bill was designed or intended to be an exercise of the power of eminent domain but there are other provisions which negate that contention even more conclusively. The Bill undertook to fix the compensation to be paid, which in eminent domain cases is a purely judicial function. It also provided that gratuities previously bestowed should be offset against the award, a procedure which clearly could not be followed in determining just compensation under the Fifth Amendment. Had Congress intended to exercise the power of eminent domain, those provisions would have been unconstitutional, *Monongahela Navigation Com-*

pany v. *United States,* 148 U. S. 312. When a statute may be construed in two ways, under one of which it would be unconstitutional and under the other constitutional, it is the duty of the courts to give it the construction which is constitutional. Therefore, the bill must be construed as having been intended merely to tender an offer to contract.

The President's veto message, *infra,* p. 53, stated in part that "the enrolled bill is objectionable because of the provision for the payment of interest from the date of origin of the claim * * *. It seems to me unreasonable to expect that the Government should be charged with interest from the dates of origin of such ancient claims. The amount of interest under the enrolled bill is several times greater than the amount of the principal. Such an interest policy would inevitably mean that issues supposed to have been placed in the way of fair determination by Jurisdictional Acts of the past will come forward again for additional interest settlements far exceeding the amounts of the original claims. *Should the item of interest be eliminated, I can now see no reason why the bill should not be approved* * * *." [Italics ours.] Because of the President's veto a bill known as S. 5523, which later became the Jurisdictional Act in this case, was drafted to meet the President's objection and referred to the Senate Committee on Indian Affairs. On February 4, 1927, the Com-

mittee reported (Senate Rep. No. 1389; Cong. Rec., Vol. 68, Pt. 3, P. 2921) as follows:

> This bill is a redraft of S. 2301, which passed both Houses of Congress but was vetoed by the President on January 28th last, because of the provision therein for the payment of interest from the date of origin of the claim. In his message the President stated should the item of interest be eliminated he could see no reason why the bill should not be approved. This bill was redrafted to correct the objection of the President *and is identical with S. 2301 except for the interest provision.* [Italics ours.]

With this statement the Committee recommended passage of the bill without amendment and it was so passed by both Houses and approved by the President. From that report it is obvious that it was the belief of the Committee that only the change indicated had been made and it is likewise obvious that Congress intended the new bill to have the same effect as the vetoed bill except for that change. As a matter of fact the Committee, in its effort to meet the President's objection, did more than merely omit the provision for the payment of interest; it deleted the provision of Section 4 that "If it be determined by the court that the United States, in violation of the terms and provisions of any law, treaty, or agreement, has appropriated or disposed of any lands, money, or

other property belonging to the Indians, damages therefor shall be confined to the value of the money, lands, or other property at the time of such appropriation or disposal, together with interest thereon at 5 per centum per annum from the date thereof"; and combined the remainder of that section with Section 3. The phrase "such money, lands, or other property" in S. 2301, the vetoed bill, referred to the provision in the first part of Section 4 of that bill regarding the appropriation or disposal of "any lands, money, or other property belonging to the Indians", and in the Jurisdictional Act, it must be understood in that sense if it is to be given any meaning whatsoever. In the light of its history it is clear that the purpose of the Act was not to take or to authorize the taking of any rights or property of the Shoshones against their will but simply to provide the Shoshones with a forum for the recovery of the value of such of their lands as had been unlawfully appropriated as of the date of the appropriation, if the Shoshones should elect to bring suit under the Act, as they have done.

This case is on all fours with that of *United States* v. *North American Transportation & Trading Company,* 253 U. S. 330. There, as here, the original entry was unauthorized and wrongful. There, as here, the unauthorized act was subsequently adopted as an offer to purchase. There, as here, there was no compulsory action by Congress or by anyone authorized by Congress. There, the the Secretary of War adopted the unauthorized

physical seizure of the land by his subordinate and this Court construed that adoption as an offer to purchase. Here, Congress adopted the unauthorized acts of officials of the Government and, by application of the same principle, Congress thereby offered to contract to pay the value of the "money, lands, or other property" which had been appropriated as of the date of the appropriation. By bringing this suit the Shoshone Indians accepted that offer and thereby a simple contractual obligation of the Government arose. It is too well settled to require discussion that the Government is not liable for interest on its contractual obligations unless the contract expressly provides therefor or some statute authorizes the payment of interest, neither of which conditions exists here.

The principles involved here and in the *North American Transportation and Trading Company* case are clearly distinguishable from those involved in *Seaboard Airline Railway Co.* v. *United States,* 261 U. S. 299; *Liggett & Myers Tobacco Company* v. *United States,* 274 U. S. 215; *Jacobs* v. *United States,* 290 U. S. 13; *Phelps* v. *United States,* 274 U. S. 341, and similar cases. In all of those cases the original appropriation was rightful because in pursuance of statutory authority previously conferred, while in this case and in the *North American Transportation and Trading Company* case the original appropriation was wrongful. It was upon this ground that this Court distinguished the *North American Transportation*

and Trading Company case from the *Jacobs* case, 290 U. S. 13. In the *Seaboard Airline* case and others of its kind the property of the plaintiffs was taken by Governmental action and the United States was bound by the Constitution to make just compensation. In this case, as in the *North American Transportation and Trading Company* case, the original appropriation created no liability, constitutional or contractual, on the part of the Government and Congress was free to repudiate it or adopt it on such terms and with such conditions as it saw fit to impose: It could have adopted the original appropriation as a forcible taking from the Shoshones against their will in the exercise of the power of eminent domain, *Crozier* v. *Friederich-Krupp Aktiengesellschaft,* 224 U. S. 290, but it clearly refrained from such action. Instead, Congress chose to treat the appropriation as an offer to contract and nothing more, and therefore the United States is liable only under that contract and not under the Fifth Amendment. *United States* v. *North American Transportation Trading Company,* 253 U. S. 330, 335.

The contention of the Government as to the effect of the Jurisdictional Act is compelling when the effect of the only other possible construction of that Act is considered. If the legislative history of the Act is disregarded, the clause in Section 3 of the Jurisdictional Act, "In reference to all claims which may be the subject-matter of the suits herein authorized, the decree of the court shall

be in full settlement of all damages, if any, committed by the Government of the United States and shall annul and cancel all claim, right, and title of the said Shoshone Indians in and to such money, lands, or other property," is utterly meaningless and must be disregarded entirely. The Act then would have the same effect as the Jurisdictional Acts in *Klamath Indians* v. *United States,* 296 U. S. 244, and *United States* v. *Mille Lac Chippewas,* 229 U. S. 498, in which cases this Court held that the Jurisdictional Act did nothing but provide a forum for the adjudication of pre-existing claims.

If this Act is construed as having that effect, the only cause of action which the Shoshones had and which is in question here is one based upon the violation of the Treaty of July 3, 1868. In such a cause of action the sole measure of damages is obviously that of actual damage sustained by the Shoshones, and there are no findings in the record in this case of any damage sustained by the Shoshones. The finding upon which the Court of Claims fixed the amount due the Shoshones for breach of the Treaty deals only with benefits derived by the Arapahoes and the United States from that breach (Finding 16, R. 53). That measure of damages would probably be correct in an action based upon a quasi-contract but clearly it is not applicable in this action for the breach of the Treaty.

Therefore, if the clause in question is given no meaning, the Shoshones are not entitled to recover for the appropriation of any interest in their reservation, and because there is no showing in the record that they have sustained any actual damage by reason of the breach of the treaty they are not entitled to recover on that account.

II

THE ACT OF 1883 DID NOT ENLARGE THE RIGHTS OF THE SHOSHONES IN THEIR RESERVATION

The Court of Claims held that by the Act of March 3, 1883, c. 141, 22 Stat. 590 (U. S. C., Title 25, Sec. 155), the Shoshones acquired "the legal or beneficial ownership" of the very valuable mineral, timber, and grazing rights in their reservation in addition to the right of exclusive use and occupancy which had been granted to them by the Treaty of July 3, 1868 (R. 78, 79).

Because of that holding the Court of Claims, in fixing its award for the undivided one-half interest which it held was "taken" from the Shoshones in 1891, considered as a major element of value the fact that "the Shoshones' reservation contained a large but undetermined amount of coal, oil and gas, phosphate, and gypsum" (R. 53), and so reached a figure of $2,050,597.50 as the value of the interest "taken." That figure was based upon a valuation of the Shoshones' rights in their reservation at the rate of $1.75 per acre (R. 79). The valuation of

the right of mere use and occupancy at anything even approaching that figure is inconceivable.

The Court of Claims also held that prior to the passage of that Act the Shoshones had nothing but the right to the exclusive use and occupancy of their reservation, and that that right did not carry with it any right, title, interest, or estate in the minerals, timber, or pasturage in the reservation, except for purposes incidental to occupancy (R. 89). Beyond doubt the court was right in that holding. *United States* v. *Cook,* 19 Wall. 591 (1873).

For that reason the Act of March 3, 1883, has no bearing upon this case if the Government's contention that the Shoshones are entitled to compensation as of 1878 is well-founded, but if the Court of Claims was correct in holding that the value of the interest of the Shoshones in their reservation as of 1891 is controlling, or if the Shoshones are correct in their contention that the value in 1927 is controlling, then the construction of that Act may be material.

That Act provided in part that "* * * the proceeds of all pasturage and sales of timber, coal, or other product of any Indian reservation, except those of the Five Civilized Tribes, and not the result of the labor of any member of such tribe, shall be covered into the Treasury for the benefit of such tribe under such regulations as the Secretary of the Interior shall prescribe; and the Secretary shall report his action in detail to Congress

at its next session." The language of that Act is clear. It merely gave the Indians a prospective interest as a gratuity in the proceeds of the sale of the products referred to therein, but before the Act could become operative the removal and sale of the timber, coal, and other products covered by the Act was necessary. The Act did not authorize any such removal or sale. It merely directed the disposition of moneys, if, as, and when any products of the reservation were severed from the soil and sold under proper authority and the proceeds of the sale were actually received. There was no such authority prior to August 13, 1891, which the Court of Claims held was the date upon which the "taking" was effected by the letter from the Commissioner of Indian Affairs to the Woodruff Commission. The Act of 1883 standing by itself and in the absence of other legislation gave the Shoshones no greater right in the timber, minerals, and other products of the reservation than they had under the Treaty of 1868.

If there were any possible doubt as to the correct construction of that Act, consideration of the circumstances surrounding its passage will aid in its construction.

In 1883 very extensive reservations comprising tens of millions of acres of land had been set apart for many tribes of Indians; most, if not all, of these reservations contained valuable stands of timber; many were known to contain large and rich mineral deposits which in this case, as in many others, were

of unknown extent and value (R. 51, 53). The timber and minerals alone on Indian reservations in existence at that time have proved to be worth many hundreds of millions of dollars.

The Act of March 3, 1883, is entitled, "An Act making appropriations to supply deficiencies in the appropriations for the fiscal year ending June thirtieth, 1883, and for prior years, and for those certified as due by the accounting officers of the Treasury in accordance with Section 4 of the Act of June fourteenth, 1878, heretofore paid from permanent appropriations, and for other purposes." In the official edition of the Statutes at Large it covers eighteen pages. The provision upon which the Court of Claims based its holding and upon which the Shoshones rely, covers just six lines in those eighteen pages. An intensive search of the records of Congress has not brought to light a single word of debate, any reference in the committee reports on that Act[2] or any other evidence that Congress gave the provision in question any consideration whatsoever.[3] Is it reasonable to suppose that Congress intended to give away, without

[2] 47th Cong., 2nd Session. House Rep. 1986, Cong. Doc. Series 2160; Senate Report, unprinted. Cong. Rec., Vol. 14, Pt. 4, pp. 3582, 3661; Conference Report, Cong. Rec., Vol. 14, Pt. 4, pp. 3693 and 3757.

[3] The provision in question here appeared for the first time as one of several amendments proposed by the Senate Committee on Appropriations, in its report on the Bill, which was made on March 3, 1883, in the closing hours of the last session of the Forty-seventh Congress. The Senate adopted the amendments proposed by the Committee, the

receiving anything in return, such a tremendous part of the public wealth by an obscure provision in a deficiency appropriation Act, which no member of Congress deemed of sufficient importance to merit debate?

Construing the Act as a grant not only strains but does violence to its language and disregards the well-established principle that one who asserts private rights in property under legislative grant must, if he would establish them, come prepared to show that they have been conferred in plain terms, for nothing passes by the grant except it be clearly stated or necessarily implied, and it is enough to deny the privileges contended for if, upon considering the Act, the mind rests in doubt and uncertainty as to whether they are intended to be conferred. *Blair* v. *Chicago,* 201 U. S. 400, 463, 467; *Charles River Bridge* v. *Warren Bridge,* 11 Pet. 420.

It is apparent that Congress did not understand the Act of 1883 as conferring upon the Indian Tribe any title to the timber, minerals, or other products of the reservation, since by an Act of February 16, 1889, c. 172, 25 Stat. 673, it was provided that the President might from year to year in his

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Bill was returned to the House, which refused to concur in the Senate amendments, a Conference Committee was appointed, it met and reported to both Houses, the Conference Report was adopted, the Bill was sent to the President, and it was signed *all on the same day.* See Cong. Rec., Vol. 14, Pt. 4, pp. 3582, 3661, 3675, 3693, 3744, 3757, 3776.

discretion and under such regulations as he might prescribe authorize the individual Indians residing on reservations or allotments, the fees to which remained in the United States, to fell, cut, remove, sell, or otherwise dispose of the dead timber, standing or fallen, on such reservation or allotment for the sole benefit of the individual Indian or Indians performing the labor. This Act of 1889, it will be observed, did not authorize the utilization of the proceeds of sale for the benefit of the tribe as a whole, which would have been necessary had the Act of 1883 vested any title in the Indian Tribe to the timber, minerals, and other products of the reservation.

It has been suggested by counsel for the Shoshones that the Act of 1883 merely recognized rights which had existed previously. To support that proposition they rely strongly upon an opinion rendered by Mr. Justice Stone while he held the office of Attorney General, which is reported in 34 Op. A. G. 171. It is submitted that that opinion of the Attorney General is not an authority which supports their contention. In that opinion the question involved was "whether or not the general oil and gas leasing act is applicable to Executive Order Indian reservations." In his opinion (p. 180) the Attorney General said:

> If it were necessary here to decide between these opposing views [i. e., whether in 1924 the Indian tribes had a mere right to use and occupancy or the equivalent of

> a fee simple title to their reservation] I should incline strongly to the latter.

From the very language of the opinion it is apparent that the statement is only an expression of an inclination and not a ruling.

The contention of the Shoshones is clearly contrary to the holdings of this Court in *United States* v. *Cook*, 19 Wall. 591, and *Pine River Logging Company* v. *United States*, 186 U. S. 279, which this Court has followed in *Northern Pacific Railroad Company* v. *Lewis*, 162 U. S. 366; *United States* v. *D. & R. G. Railroad Company*, 191 U. S. 84; *United States* v. *Paine Lumber Company*, 206 U. S. 467. In the *Cook* case (p. 594) this Court held that "what a tenant for life may do upon the lands of a remainder-man the Indians may do upon their reservations, but no more." In following and applying that doctrine in the *Pine River Logging Company* case this Court held that "the Indians had no right to the timber upon this land other than to provide themselves with the necessary wood for their individual use, or to improve their land * * * *except so far as Congress chose to extend such right* * * *" (p. 290) [italics ours]. No plainer statement of the principles involved here could be made.

Moreover, it would seem that it was unnecessary for the Court of Claims to construe the Act of March 3, 1883, at all. If that Act did grant anything to the Indians, it must be admitted that what

was granted was a gratuity and the Jurisdictional Act under which this suit was brought provides in substance that the United States may offset any gratuities which it may have bestowed upon the Tribe against any claims which the Tribe may have against the United States. Therefore, it necessarily follows that any claim for the appropriation of the gratuity bestowed by the Act of 1883 would be completely offset by the value of that gratuity. As a matter of fact, if the Shoshones' contention is correct, the United States would have been entitled to an offset larger than the claim of the Shoshones, since between 1884 and 1927 much timber was cut and large quantities of minerals were removed, thereby greatly reducing the value of whatever was bestowed before it was retaken. The great bulk of the fund of $1,628,744.56 described in Finding 24 (R. 59) was derived from the sales of timber and minerals and consequently the value of whatever property might have been bestowed by the Act of March 3, 1883, had been diminished in 1927 to the extent of the value of the minerals mined and the timber cut.

III

THE CONTENTIONS URGED BY THE SHOSHONES WHICH HAVE NOT BEEN DISPOSED OF HERETOFORE ARE WITHOUT MERIT

The first six and the eighth and ninth assignments of error of the Shoshones, relating to the claim of "taking", are disposed of in the Govern-

ment's first point in this brief (pp. 15–30). However, lest there be any misunderstanding with regard to the Shoshones' second assignment of error which is that "The Court erred as a matter of law in not holding that the permanent taking of the Arapahoes' allotments and the undivided half interest in the tribal lands of the Shoshones' reservation occurred in 1927 upon the passage of the Jurisdictional Act herein and the filing of this suit by the Shoshone Tribe under said Act", it is deemed appropriate to reiterate briefly the points which refute that contention.

1. Under the Jurisdictional Act the rights of the Shoshones could be affected only by the filing of this suit. The necessity of this voluntary act on the part of the Shoshones clearly negatives any possibility of eminent domain being within the purview of the Act.

2. Properly construed, the Act prohibits the payment of "just compensation."

3. The Act provides for the offsetting of gratuities previously bestowed against the award, which cannot be done in the exercise of the power of eminent domain.

4. Section 3 of the Act provides in part that "the decree of the court shall be in full settlement of all damages, *if any,* committed by the Government of the United States and shall annul and cancel all claim, right, and title of said Shoshone Indians in and to such money, lands, or other property."

The phrase "if any" in that section clearly indicates that Congress did not intend to exercise the power of eminent domain by that Act.

The Shoshones' seventh assignment of error comprises three points; first, that the compensation allowed them for the use and occupancy of the reservation by the Arapahoes from 1878 to 1891 was inadequate (R. 53, 81–82), secondly, that the Court of Claims should have allowed them compensation for use and occupancy by the Arapahoes from 1891 to 1927, and, third, that in any event the court should have allowed compensation "together with such additions thereto as may be required to produce the present full equivalent of such compensation paid contemporaneously with said temporary use and occupancy. Interest at a reasonable rate is suitable measure by which to ascertain the amount which should have been added."

The first point obviously involves the determination of questions of fact, which, of course, are not subject to review in this Court. *Luckenbach Steamship Company* v. *United States,* 272 U. S. 533, 540.

The second point is without merit unless the Shoshones are correct in their contention that their title to an undivided one-half interest was taken by eminent domain by the Jurisdictional Act of 1927. It is submitted that it has been demonstrated that that contention is unsound.

To the third point presented by that assignment there are two answers: first, that the appropria-

tion occurred in 1878 and under the Jurisdictional Act the rights of the parties are fixed as of that date, and, therefore, the Shoshones are not entitled to any compensation whatsoever for the use and occupancy of the reservation thereafter; and, secondly, if the Shoshones are entitled to any compensation for use and occupancy of the reservation by the Arapahoes, their claim therefor must arise out of a breach of the Treaty of July 3, 1868, and the liability of the Government is simply for breach of contract. The Government is not liable for interest for breach of contract unless the contract expressly so provides, or some statute authorizes the payment of interest, neither of which conditions exist in this case. *United States* v. *North American Transportation & Trading Co.*, 253 U. S. 330.

The fallacy of this third point is established by the fact that the language of the assignment of error is merely a paraphrase of the language employed by this Court in *Seaboard Airline Railway Co.* v. *United States,* 261 U. S. 299, 306, stating the rule applicable in eminent domain cases. Both parties are agreed that the power of eminent domain was not exercised prior to 1927 and consequently rules applicable to the exercise of that power are not applicable to claims for damages arising before that time.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment of the Court of Claims should be reversed and the case remanded for further proceedings.

STANLEY REED,
Solicitor General.
HARRY W. BLAIR,
Assistant Attorney General.
FRANK CHAMBERS,
Special Assistant to the Attorney General.
GEORGE T. STORMONT,
CHARLES H. SMALL,
W. MARVIN SMITH,
Attorneys.
RALPH S. BOYD,
Special Attorney.

DECEMBER 1936.

APPENDIX

TREATY BETWEEN THE UNITED STATES OF AMERICA AND THE EASTERN BAND OF SHOSHONEES AND THE BANNACK TRIBE OF INDIANS; CONCLUDED, JULY 3, 1868; RATIFICATION ADVISED, FEBRUARY 16, 1869; PROCLAIMED, FEBRUARY 24, 1869, 15 STAT. 673

ARTICLE 1. From this day forward peace between the parties to this treaty shall forever continue. The government of the United States desires peace, and its honor is hereby pledged to keep it. The Indians desire peace, and they hereby pledge their honor to maintain it.

If bad men among the whites, or among other people subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs at Washington City, proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and also reimburse the injured person for the loss sustained.

If bad men among the Indians shall commit a wrong or depredation upon the person or property of any one, white, black, or Indian, subject to the authority of the United States, and at peace therewith, the Indians herein named solemnly agree that they will, on proof made to their agent and notice by him, deliver up the wrong-doer to the United States, to be tried and punished according

to its laws; and in case they wilfully refuse so to do, the person injured shall be reimbursed for his loss from the annuities or other moneys due or to become due to them under this or other treaties made with the United States. And the President, on advising with the Commissioner of Indian Affairs, shall prescribe such rules and regulations for ascertaining damages under the provisions of this article as in his judgment may be proper. But no such damages shall be adjusted and paid until thoroughly examined and passed upon by the Commissioner of Indian Affairs, and no one sustaining loss while violating or because of his violating the provisions of this treaty or the laws of the United States shall be reimbursed therefor.

ARTICLE II. It is agreed that whenever the Bannacks desire a reservation to be set apart for their use, or whenever the President of the United States shall deem it advisable for them to be put upon a reservation, he shall cause a suitable one to be selected for them in their present country, which shall embrace reasonable portions of the "Port Neuf" and "Kansas Prairie" countries, and that, when this reservation is declared, the United States will secure to the Bannacks the same rights and privileges therein, and make the same and like expenditures therein for their benefit, except the agency house and residence of agent, in proportions to their numbers, as herein provided for the Shoshonee reservation. The United States further agrees that the following district of country, to wit: commencing at the mouth of Owl creek and running due south to the crest of the divide between the Sweetwater and Papo Agie rivers; thence along the crest of said divide and the summit of Wind River

mountains to the longitude of North Fork of Wind river; thence due north to mouth of said North Fork and up its channel to a point twenty miles above its mouth; thence in a straight line to headwaters of Owl creek and along middle of channel of Owl creek to place of beginning, shall be and the same is set apart for the absolute and undisturbed use and occupation of the Shoshonee Indians herein named, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them; and the United States now solemnly agrees that no persons except those herein designated and authorized so to do, and except such officers, agents, and employees of the government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the territory described in this article for the use of said Indians, and henceforth they will and do hereby relinquish all title, claims, or rights in and to any portion of the territory of the United States, except such as is embraced within the limits aforesaid.

ARTICLE III. The United States agrees, at its own proper expense, to construct at a suitable point on the Shoshonee reservation a warehouse or storeroom for the use of the agent in storing goods belonging to the Indians, to cost not exceeding two thousand dollars; an agency building for the residence of the agent, to cost not exceeding three thousand; a residence for the physician, to cost not more than two thousand dollars; and five other buildings, for a carpenter, farmer, blacksmith, miller, and engineer, each to cost not exceeding two

thousand dollars; also a schoolhouse or mission building so soon as a sufficient number of children can be induced by the agent to attend school, which shall not cost exceeding twenty-five hundred dollars.

The United States agrees further to cause to be erected on said Shoshonee reservation, near the other buildings herein authorized, a good steam circular saw-mill, with a grist-mill and shingle machine attached, the same to cost not more than eight thousand dollars.

ARTICLE IV. The Indians herein named agree, when the agency house and other buildings shall be constructed on their reservations named, they will make said reservations their permanent home, and they will make no permanent settlement elsewhere; but they shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and so long as peace subsists among the whites and Indians on the borders of the hunting districts.

ARTICLE V. The United States agrees that the agent for said Indians shall in the future make his home at the agency building on the Shoshonee reservation, but shall direct and supervise affairs on the Bannack reservation; and shall keep an office open at all times for the purpose of prompt and diligent inquiry into such matters of complaint by and against the Indians as may be presented for investigation under the provisions of their treaty stipulations, as also for the faithful discharge of other duties enjoined by law. In all cases of depredation on person or property he shall cause the evidence to be taken in writing and forwarded, together with his finding, to the Commis-

sioner of Indian Affairs, whose decision shall be binding on the parties to this treaty.

ARTICLE VI. If any individual belonging to said tribes of Indians, or legally incorporated with them, being the head of a family, shall desire to commence farming, he shall have the privilege to select, in the presence and with the assistance of the agent then in charge, a tract of land within the reservation of his tribe, not exceeding three hundred and twenty acres in extent, which tract so selected, certified, and recorded in the "land book" as herein directed, shall cease to be held in common, but the same may be occupied and held in the exclusive possession of the person selecting it, and of his family, so long as he or they may continue to cultivate it.

Any person over eighteen years of age, not being the head of a family, may in like manner select and cause to be certified to him or her, for purposes of cultivation, a quantity of land not exceeding eighty acres in extent, and thereupon be entitled to the exclusive possession of the same as above described. For each tract of land so selected a certificate, containing a description thereof, and the name of the person selecting it, with a certificate endorsed thereon that the same has been recorded, shall be delivered to the party entitled to it by the agent, after the same shall have been recorded by him in a book to be kept in his office subject to inspection, which said book shall be known as the "Shoshonee (eastern band) and Bannack Land Book."

The President may at any time order a survey of these reservations, and when so surveyed Congress shall provide for protecting the rights of the Indian settlers in these improvements, and may fix

the character of the title held by each. The United States may pass such laws on the subject of alienation and descent of property as between Indians, and on all subjects connected with the government of the Indians on said reservations, and the internal police thereof, as may be thought proper.

ARTICLE VII. In order to insure the civilization of the tribes entering into this treaty, the necessity of education is admitted, especially of such of them as are or may be settled on said agricultural reservations, and they therefore pledge themselves to compel their children, male and female, between the ages of six and sixteen years, to attend school; and it is hereby made the duty of the agent for said Indians to see that this stipulation is strictly complied with; and the United States agrees that for every thirty children between said ages who can be induced or compelled to attend school, a house shall be provided and a teacher competent to teach the elementary branches of an English education shall be furnished, who will reside among said Indians and faithfully discharge his or her duties as a teacher. The provisions of this article to continue for twenty years.

ARTICLE VIII. When the head of a family or lodge shall have selected lands and received his certificate as above directed, and the agent shall be satisfied that he intends in good faith to commence cultivating the soil for a living, he shall be entitled to receive seeds and agricultural implements for the first year, in value one hundred dollars, and for each succeeding year he shall continue to farm for a period of three years more, he shall be entitled to receive seeds and imple-

ments as aforesaid in value twenty-five dollars per annum.

And it is further stipulated that such persons as commence farming shall receive instructions from the farmers herein provided for, and whenever more than one hundred persons on either reservation shall enter upon the cultivation of the soil, a second blacksmith shall be provided, with such iron, steel, and other material as may be required.

ARTICLE IX. In lieu of all sums of money or other annuities provided to be paid to the Indians herein named, under any and all treaties heretofore made with them, the United States agrees to deliver at the agency house on the reservation herein provided for, on the first day of September of each year, for thirty years, the following articles, to wit:

For each male person over fourteen years of age, a suit of good substantial woollen clothing, consisting of coat, hat, pantaloons, flannel shirt, and a pair of woollen socks; for each female over twelve years of age, a flannel skirt, or the goods necessary to make it, a pair of woollen hose, twelve yards of calico, and twelve yards of cotton domestics.

For the boys and girls under the ages named, such flannel and cotton goods as may be needed to make each a suit as aforesaid, together with a pair of woollen hose for each.

And in order that the Commissioner of Indian Affairs may be able to estimate properly for the articles herein named, it shall be the duty of the agent each year to forward to him a full and exact census of the Indians, on which the estimate from year to year can be based; and in addition to the clothing herein named, the sum of ten dollars shall

be annually appropriated for each Indian roaming and twenty dollars for each Indian engaged in agriculture, for a period of ten years, to be used by the Secretary of the Interior in the purchase of such articles as from time to time the condition and necessities of the Indians may indicate to be proper. And if at any time within the ten years it shall appear that the amount of money needed for clothing under this article can be appropriated to better uses for the tribes herein named, Congress may by law change the appropriation to other purposes; but in no event shall the amount of this appropriation be withdrawn or discontinued for the period named. And the President shall annually detail an officer of the army to be present and attest the delivery of all the goods herein named to the Indians, and he shall inspect and report on the quantity and quality of the goods and the manner of their delivery.

ARTICLE X. The United States hereby agrees to furnish annually to the Indians the physician, teachers, carpenter, miller, engineer, farmer, and blacksmith, as herein contemplated, and that such appropriations shall be made from time to time, on the estimates of the Secretary of the Interior, as will be sufficient to employ such persons.

ARTICLE XI. No treaty for the cession of any portion of the reservations herein described which may be held in common shall be of any force or validity as against the said Indians, unless executed and signed by at least a majority of all the adult male Indians occupying or interested in the same; and no cession by the tribe shall be understood or construed in such manner as to deprive

without his consent any individual member of the tribe of his right to any tract of land selected by him, as provided in Article VI of this treaty.

ARTICLE XII. It is agreed that the sum of five hundred dollars annually, for three years from the date when they commence to cultivate a farm, shall be expended in presents to the ten persons of said tribe, who, in the judgment of the agent, may grow the most valuable crops for the respective year.

ARTICLE XIII. It is further agreed that until such time as the agency buildings are established on the Shoshonee reservation, their agent shall reside at Fort Bridger, U. T., and their annuities shall be delivered to them at the same place in June of each year.

ACT OF MARCH 3, 1883, CHAPTER 141, 22 STAT. 582, 590

* * * * *

The proceeds of all pasturage and sales of timber, coal, or other product of any Indian reservation, except those of the five civilized tribes, and not the result of the labor of any member of such tribe, shall be covered into the Treasury for the benefit of such tribe under such regulations as the Secretary of the Interior shall prescribe; and the Secretary shall report his action in detail to Congress at its next session.

THE JURISDICTIONAL ACT OF MARCH 3, 1927, C 302, 44 STAT., PT. 2, P. 1349

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That jurisdiction be, and is hereby, conferred upon the Court of Claims, with

right of appeal to the Supreme Court of the United States by either party, notwithstanding the lapse of time or statutes of limitation, to hear, examine, adjudicate, and render judgment in any and all legal and equitable claims which the Shoshone Tribe of Indians of the Wind River Reservation in the State of Wyoming may have against the United States arising under or growing out of the treaty of July 3, 1868 (Fifteenth Statutes, page 673), or arising under or growing out of any subsequent treaty or agreement between said Shoshone Tribe of Indians and the United States or any subsequent Act of Congress affecting said tribe, which claims have not heretofore been determined and adjudicated upon their merits by the Court of Claims or the Supreme Court of the United States.

SEC. 2. The claims of said tribe shall be presented by petition, subject, however, to amendment at any time. The suit under this Act shall be instituted or petition filed in the Court of Claims within three years from the date of approval of this Act. Such suit shall make the Shoshone Tribe of Indians of the Wind River Reservation in Wyoming party plaintiff and the United States party defendant. The petition shall be verified upon information and belief by the attorney or attorneys employed by said tribe to prosecute said claims under contract approved by the Commissioner of Indian Affairs and the Secretary of the Interior. Letters, papers, documents, and public records, or certified copies thereof, bearing upon the claims presented, may be used in evidence; and the departments of Government shall give the attorney of said tribe access to any such letters, papers, docu-

ments, or public records, and shall furnish certified copies of such thereof as may be deemed material.

SEC. 3. In said suit the court shall also hear, examine, and adjudicate any claims which the United States may have against said tribe, but any payment, including gratuities which the United States may have made to said tribe, shall not operate as an estoppel, but may be pleaded as an offset in such suit: *Provided, however,* That the United States may interpose to such suit or action any and all pleas of defense, affirmative and negative, legal and equitable, which it may have thereto not herein specifically barred by the provisions of this Act. In reference to all claims which may be the subject matter of the suits herein authorized, the decree of the court shall be in full settlement of all damages, if any, committed by the Government of the United States and shall annul and cancel all claim, right, and title of the said Shoshone Indians in and to such money, lands, or other property.

SEC. 4. Upon final determination of such suit or suits the Court of Claims shall have jurisdiction to fix and determine a reasonable fee, not to exceed 10 per centum of the recovery, together with all necessary and proper expenses incurred in preparation and prosecution of the suit, to be paid to the attorneys employed by said Shoshone Tribe of Indians, and the same shall be included in the decree and shall be paid out of any sum or sums found to be due said tribe.

SEC. 5. The Court of Claims shall have full authority by proper orders and process to bring in and make parties to said suit any or all persons

deemed by it necessary or proper to the final determination of the matters in controversy.

SEC. 6. A copy of the petition in such suit shall be served upon the Attorney General of the United States, and he, or some attorney from the Department of Justice to be designated by him, is hereby directed to appear and defend the interests of the United States.

SEC. 7. All amounts which may be found due and recovered for said tribe under the provisions of this Act, less attorneys' fees and expenses, shall be deposited in the Treasury of the United States to the credit of said tribe and shall draw interest at the rate of 4 per centum per annum from the date of the judgment or decree.

VETO MESSAGE RELATING TO THE ACT AUTHORIZING THE SHOSHONE TRIBE OF INDIANS OF THE WIND RIVER RESERVATION IN WYOMING TO SUBMIT CLAIMS TO THE COURT OF CLAIMS

Congressional Record (vol. 68, part 3, page 2414 (69 Cong., 2d Sess.))

To the Senate:

I am returning herewith Senate bill 2301, "An act authorizing the Shoshone Tribe of Indians, of the Wind River Reservation, in Wyoming, to submit claims to the Court of Claims," without my approval.

The Fort Bridger treaty of July 3, 1868 (15 Stat. 673), set aside a reservation for the Shoshone Indians and for such other tribes as the Shoshones might "admit amongst them," but also provided that no cession of any portion of the reservation should be valid unless a treaty for the purpose

should be signed by a majority of the male adult Indians of the Shoshone Tribe. Afterwards the northern band of Arapaho Indians were located on the Shoshone Reservation.

The Shoshone Indians claim that a majority of the male adult Shoshones did not sign a treaty agreeing to the cession to the Arapahoes of a portion of the reservation; that the consent, if any, given by the Shoshones to the location of the Arapahoes on the reservation was for temporary occupancy only, and that the Shoshones have from time to time asserted that they should be compensated for the land occupied by the Arapahoes.

It might be fair to say that these contentions may be disposed of, it seems to me, by the fact that in 1896 and 1904 reservation lands were ceded by agreements signed by both the Shoshones and the Arapahoes which provided that the moneys received therefor should be divided between the Shoshones and the Arapahoes. Congress ratified these agreements, and they were carried into effect. Still this objection might not be fatal.

But, aside from the question of the merit of the claim, the enrolled bill is objectionable because of the provision for the payment of interest from the date of origin of the claim. It had never been Government policy, prior to the Crow Indian jurisdictional act of July 3, 1926, to provide for the payment of interest from the date of origin of a claim. I am now satisfied that further departure from our former policy would be unjustified. It seems to me unreasonable to expect that the Government should be charged with interest from the dates of origin of such ancient claims. The amount of the interest under the enrolled bill is several

times greater than the amount of the principal. Such an interest policy would inevitably mean that issues supposed to have been placed in the way of fair determination by jurisdictional acts of the past will come forward again for additional interest settlements far exceeding the amounts of the original claims. Should the item of interest be eliminated, I can now see no reason why the bill should not be approved. But if interest is to be allowed on this claim, it will certainly result in an effort to reopen an endless number of claims which have already been settled.

CALVIN COOLIDGE.

THE WHITE HOUSE,
January 28, 1927.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 216

SHOSHONE TRIBE OF INDIANS OF THE WIND RIVER RESERVATION IN WYOMING,

Petitioner,

v.

THE UNITED STATES.

No. 328

THE UNITED STATES,

Petitioner,

v.

SHOSHONE TRIBE OF INDIANS OF THE WIND RIVER RESERVATION IN WYOMING.

ON WRITS OF CERTIORARI TO THE COURT OF CLAIMS.

BRIEF OF AMICUS CURIÆ ON THE QUESTION OF THE RIGHTS OF AN INDIAN TRIBE IN STANDING TIMBER, MINERALS, ETC., ON LANDS WITHIN THEIR RESERVATION.

G. CARROLL TODD,
Counsel for Klamath and Moadoc Tribes and Yahooskin Band of Snake Indians, as amicus curiæ.

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I.

Preliminary Statement.

One of the questions in this case relates to the nature and extent of the rights of an Indian tribe in lands reserved for their use and occupation by treaty or Executive order,

particularly as regards such things as standing timber, mineral deposits in place, etc.

The Klamath Indians have an immediate interest in this question because it is also involved, as the Government maintains, in a case instituted by them and now pending in the Court of Claims, No. E-346.

The position of the Klamath Indians is that the whole beneficial interest in such lands, including the beneficial interest in the standing timber, mineral deposits, etc., belongs to the Indians, subject to the right of the United States, as sovereign and owner of the naked fee, to control alienation, and to prevent waste and recover the proceeds of anything severed from the lands by acts constituting waste, and to take possession of the lands should the Indians abandon them.

II.

Argument.

The nature of the Indian title has been discussed in many cases. In *Worcester* v. *State of Georgia*, 6 Pet. 515, 580, 8 L. ed. 483, 508, it was said:

> "* * * Their right of occupancy has never been questioned, but the fee in the soil has been considered in the government. This may be called *the right to the ultimate domain,* but the Indians have a present right of possession." [Italics ours.]

And again in *Mitchell* v. *United States*, 9 Pet. 711, 746, 9 L. ed. 283, 296:

> "Indian possession or occupation was considered with reference to their habits and modes of life; their hunting-grounds were as much in their actual possession as the cleared fields of the whites; and their rights to its exclusive enjoyment in their own way and for their own purposes were as much respected, until

they abandoned them, made a cession to the government, or an authorized sale to individuals. * * *

"* * * it is enough to consider it as a settled principle that their right of occupancy is considered as sacred as the fee-simple of the whites."

And in *Holden* v. *Joy,* 17 Wall. 211, 244, 21 L. ed. 523, 534:

"Throughout, the Indians, as tribes or nations, have been considered as distinct, independent communities, retaining their original natural rights as the undisputed possessors of the soil, from time immemoral, subject to the conditions imposed by the discoverers of the continent, which excluded them from intercourse with any other government than that of the first discoverer of the particular section claimed. They could sell to the government of the discoverer, but they could not sell to any other governments or their subjects, as the government of the discoverer acquired, by virtue of their discovery, the exclusive preemption right to purchase, and the right to exclude the subjects of all other governments, and even their own, from acquiring title to the lands.

"Enough has already been remarked to show that the lands conveyed to the United States by the treaty were held by the Cherokees under their original title, acquired by immemorial possession, commencing ages before the New World was known to civilized man. Unmistakably their title was absolute, subject only to the preemption right of purchase acquired by the United States as the successors of Great Britain, and the right also on their part as such successors of the discoverer to prohibit the sale of the land to any other governments or their subjects, and to exclude all other governments from any interference in their affairs."

In *United States* v. *Cook,* 19 Wall. 591, 22 L. ed. 210, the controversy was over the ownership of logs cut from the Oneida Indian Reservation in Wisconsin by a member of the tribe for the sole purpose of sale. Holding, as had

always been held, that the Indians in possession of a reservation have only a right of occupancy in the land and that the fee is in the United States, it was decided that the members of the Oneida Tribe had no right to cut the timber on the land solely for the purpose of sale; that to do so was waste as in the case of the cutting of timber by a trespasser; and that the United States as the owner of the fee became the owner of the logs.

In reaching its conclusion the Court defined the nature and attributes of the Indian right of occupancy, saying:

> "The right of the Indians to their occupancy is as sacred as that of the United States to the fee. * * *." 19 Wall. 593, 22 L. ed. 211.

And that—

> "This right of use and occupancy by the Indians is *unlimited*. They may exercise it at their discretion. If the lands in a state of nature are not in a condition for profitable use, they may be made so. If desired for the purposes of agriculture, they may be cleared of their timber to such an extent as may be reasonable under the circumstances. The timber taken off by the Indians in such clearing may be sold by them. But to justify any cutting of the timber, except for use upon the premises, as timber or its product, it must be done in good faith for the improvement of the land. The improvement must be the principal thing, and the cutting of the timber the incident only. Any cutting beyond this would be waste and unauthorized.
>
> "The timber, while standing, is a part of the realty, and it can only be sold as the land could be. The land cannot be sold by the Indians, and consequently the timber, until rightfully severed, cannot be. It *can* be rightfully severed for the purpose of improving the land, or the better adapting it to convenient occupation, but for no other purpose. When rightfully severed it is no longer a part of the land, and there is no restriction upon its sale. Its severance under

such circumstances is, in effect, only a legitimate use of the land." 19 Wall. 593, 22 L. ed. 211. [Italics ours.]

Thus, two points were decided. On the one hand, by analogy to the law relating to the respective rights of life-tenant and remainder-man, it was decided that the Indians have no right to cut the timber on an Indian reservation for the purpose of sale only; that to do so is waste, and that the title to timber so cut vests in the United States as the owner of the fee or "ultimate domain." On the other hand, it was decided that the Indians have an exclusive right of use and occupancy of *unlimited duration*, and the right to cut the standing timber *during the whole period of such occupancy* not only for use upon the premises but "for the purpose of improving the land or the better adapting it to convenient occupation," and the right to sell all timber cut for the latter purpose. This leaves the United States with no right to cut or dispose of the timber for any purpose of its own whatever.

The Government argues that the *Cook Case* decided that the *interest* of the Indians in the timber on their reservations "is that of a life tenant and no more." The Court did say, "What a tenant for life may *do* upon the lands of a remainder-man the Indians may *do* upon their reservation, but no more." 19 Wall. 594, 22 L. ed. 211. [Italics ours.] But in thus comparing the position of the Indians with that of a tenant for life, for the purpose of laying down a rule as to what things the Indians may and may not *do* on their reservations, the Court could not possibly have meant that the Indians' *interest* in the lands of their reservations is only that of a tenant for life. For that would have been directly in conflict with its carefully formulated statement, after reviewing prior cases, of the nature of the Indian title—that the Indians have a right of use and occupancy of *unlimited duration*, and an accom-

panying right of *unlimited duration* to cut timber for use upon the premises and also for the purpose of improving the land or the better adapting it to convenient occupation, and the right to sell all timber cut for that purpose.

In *Leavenworth, etc., R. R. Co.* v. *United States,* 23 Wall. 733, 23 L. ed. 634, the case was this: The Treaty of June 2, 1825, between the United States and the Osage Tribes of Indians, 7 Stat. 240, reserved for the occupancy of the Indians for an unlimited period a tract of land lying within the boundaries of what subsequently became a part of the State of Kansas. By an act approved March 3, 1863, 12 Stat. 772, Congress granted to the State every alternate section of land on each side of a projected line of railroad to aid in its construction. The state assigned the grant to the plaintiff in error. The line of the proposed railroad traversed part of the reservation of the Osage Indians. By the Treaty of January 21, 1867, 14 Stat. 687, the Indians ceded a part of their reservation, including the part through which this railroad passed, to the United States.

The question was whether the grant made by the Act of March 3, 1863, included the interest of the United States in the sections of land contiguous to the railroad in the Osage Reservation. It was held that this could not have been intended for the reason among others that the interest of the United States was only an "ultimate fee", subject to a "perpetual right of occupancy" in the Indians, and therefore would have been of no immediate practical benefit for the purpose of the grant. 23 Wall. 743, 23 L. ed. 638.

Referring to the nature of the Indian title in general, the Court said:

> "As long ago as in *Cherokee Nation* v. *Georgia,* 5 Pet. 1, this court said that the Indians are acknowledged to have the unquestionable right to the lands

they occupy, until that right shall be extinguished by a voluntary cession to the Government; and recently, *United States* v. *Cook*, 19 Wall. 591, 22 L. ed. 210, this right of occupancy has been held to be sacred as the title of the United States to the fee. * * * This *perpetual right of occupancy*, with the correlative obligation of the Government to enforce it, negatives the idea that Congress, even in the absence of any positive stipulation to protect the Indians, intended to grant their lands to a railroad company, either absolutely or cum onere. *For all practical purposes, the Osages owned the lands* as the actual right of possession, the only thing they deemed of value, was secured to them by the treaty of June 2, 1825, until they should elect to surrender it to the United States. In the free exercise of their choice, *they might occupy their lands forever*, and whatever changed this condition or interferred with it, violated the guaranties under which they had lived since that date." 23 Wall. 742-743, 23 L. ed. 638. [Italics ours.]

In *Beecher* v. *Wetherby*, 95 U. S. 517, 24 L. ed. 440, the question was as to the ownership of logs cut from a tract of land claimed by the defendant under a grant from the State of Minnesota made in 1870. The tract was within the limits of a grant of public lands from the United States to the State on the occasion of its admission into the Union in 1848.

The defendant's title was disputed on the ground that the tract was part of the land reserved for the occupancy of the Menomonee Tribe of Indians by the Treaties of 1825 and 1831 and therefore did not pass to the State by the grant of 1848.

It was held, citing *United States* v. *Cook*, *ante*, that while the Indians had a right of occupancy in the tract as a part of their reservation, the United States could and did by

the grant of 1848 transfer the fee,[1] 95 U. S. 525, 526, 24 L. ed. 441, 442; that this was only a *"naked fee,"* however, "subject * * * to the existing occupancy of the Indians *so long as that occupancy should continue,"* 95 U. S. 525, 526, 24 L. ed. 441, 442; that, nevertheless, the logs belonged to the defendant because before they were cut the Indians had removed from the land, causing the right of possession to attach itself to the fee, 95 U. S. 526-527, 24 L. ed. 442. [Italics ours.]

In other words, the interest of the United States in the Indian land, being only a naked fee, did not embrace any vested rights in the timber, but only a right contingent on the Indian occupancy coming to an end—a contingency which happened in that case but might not happen in another.

Referring to *Beecher* v. *Wetherby,* Attorney General Stone in an opinion to the President dealing with the question "whether the Indians' right of 'occupancy and use' included any right to the hidden and latent resources of the land," said:

> "If a transfer by the United States would convey only the naked fee, it goes without saying that the *complete equitable property was in the Indians.* The earlier and fundamental decisions make this plain. In *Worcester* v. *Georgia,* 6 Pet. 515, 544, 545, Chief Justice Marshall clearly states that the right asserted in behalf of the discovering European nations was merely a right, *as against each other,* which he defines as 'the exclusive right of purchasing such lands as the natives were willing to sell.' As late as 1872 the Supreme Court said: 'Unmistakably their title was

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[1] There were no circumstances present, as in *Leavenworth, etc. R. R. Co.* v. *United States, ante,* indicating an intention *not* to transfer the fee.

> absolute, subject only to the preemption right of purchase acquired by the United States as the successors of Great Britain, and the right * * * to prohibit the sale of the land *to* any other governments or their subjects.' (*Holden* v. *Joy*, 17 Wall. 211, 244.)" 34 Ops. A. G. 171, 181. [Italics ours.]

In *Ash Sheep Co.* v. *United States*, 252 U. S. 159, 64 L. ed. 507, the question was whether the pasturing of cattle on the Crow Indian Reservation in Montana without the consent of the Indians violated R. S. U. S. § 2117, prohibiting the pasturing of cattle "on any land *belonging* to any Indian or Indian tribe, without the consent of such tribe." [Italics ours.]

This was a reservation "set apart for the absolute and undisturbed use and occupation of the Indians," Treaty of May 7, 1868, 15 Stat. 649, 650, so that the Crows had only the ordinary Indian title—the right of use and occupation.

The cattle in question were pastured on a part of the reservation which had been ceded to the United States, to be sold for the benefit of the Indians, and the contention was that this part at least was not "land belonging to any Indian tribe."

It was held, however, that even this part of the reservation, until sold by the United States, was "land belonging to [an] Indian tribe," as the United States held it only as a trustee.

In *California & Oregon Land Co.* v. *Worden*, 85 Fed. 94, 96, referring to the title of the Klamath Tribes, which is no different from that under which Indian tribes in general hold their reservations, the District Court held that—

> "For all purposes, therefore, save only that of private sale, the Indians were in fact the owners of these lands."

Thus, as judicially declared, the respective rights of an Indian tribe and of the United States in a reservation occupied by the tribe under what is called the Indian title, whether aboriginal or based on treaty or Executive order, are as follows:

First, the Indians have a right of occupancy in perpetuity, i. e., until voluntary abandonment (subject of course like all private rights to termination by the United States in the exercise of its powers as sovereign upon payment of just compensation), and, so long as they do not commit waste, may exercise this right at their discretion—in such mode as they see fit; that as regards standing timber in particular, while they may not cut it for the *sole* purpose of sale, as that would be waste, they are entitled to cut it as long as their right of occupancy continues, i. e., for an unlimited time, for "use upon the premises," and "for the purpose of improving the land or the better adapting it to convenient occupation," and are entitled to sell all timber cut for the latter purpose.

Second, the United States has a "naked fee," "the right to the ultimate domain," which gives it the right to prevent waste and to recover the proceeds of anything severed from the land by acts constituting waste, and also the right to control alienation of the Indians' interest, but nothing more unless the Indians should abandon possession, in which event the right of possession would attach to the fee.

In other words, the whole beneficial interest belongs to the Indians.

The acts of Congress and the acts and official statements of the Executive Department relating to the disposition of Indian lands likewise recognize that the whole beneficial interest in the lands of an Indian reservation, including

standing timber, mineral deposits, and the like, belongs to the Indians.

The Act of March 3, 1883, provided that:

> "The proceeds of all pasturage and sales of timber, coal, or other product of any Indian reservation, * * * shall be covered into the Treasury for the benefit of such tribe under such regulations as the Secretary of the Interior shall prescribe; * * *."[1] 22 Stat. 582, 590.

The Act of February 8, 1887, § 5, providing for the allotment of portions of Indian reservations among the mem-

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[1] The Court of Claims apparently took the view that this statute is the source of the Indians' right to timber, minerals, etc., on the lands of their reservations. The better view is, we think, that the statute simply recognized a right which already existed. "In respect to legislation and treaties of this character two views are possible. First, that the right of occupancy and use extends merely to the surface and the United States, in providing that the Indians shall ultimately receive the value of the hidden and latent resources, merely gives them its own property as an act of grace. Second, that the Indian possession extended to all elements of value in or connected with their lands, and the government, in securing those values to the Indians, recognizes and confirms their preexisting right. If it were necessary here to decide as between these opposing views, I should incline strongly to the latter; mainly because the Indian possession has always been recognized as complete and exclusive until terminated by conquest or treaty, or by the exercise of that plenary power of guardianship to dispose of tribal property of the Nation's wards without their consent." Opinion of Attorney General Stone, 34 Ops. A. G. 171, 180.

But according to either view, since 1883 the whole beneficial interest in the lands of Indian reservations has belonged to the Indians.

The Government suggests that if, as the Court of Claims seems to have thought, the Indians' right in standing tim-

bers of the respective tribes and for the sale of the remainder to the United States, expressly stipulated that,

> "the sums agreed to be paid by the United States as purchase money for any portion of any such reservations shall be held in the Treasury of the United States

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ber, minerals, etc., was derived from the Act of March 3, 1883, it was a gratuity, and therefore the value of the right must be deducted under the set-off provision of the jurisdictional act in arriving at the amount of the judgment to which the Indians are entitled.

The set-off provision in the jurisdictional act under which this suit was instituted reads—"any *payment*, including gratuities which the United States may have made to said tribe, shall not operate as an estoppel but may be pleaded as an off-set in such suit." [Italics ours.] Another form is—"the United States shall be allowed credit for all *sums*, including gratuities, heretofore *paid* or *expended* for the benefit of said Indians." [Italics ours.]

Assuming for argument's sake that the Indians *did* derive their right in standing timber, minerals, etc., as a grant under the Act of March 3, 1883, and that it was not a preexisting right, it seems plain that such a grant would not be a "payment" to the Indians or a "sum * * * paid or expended" for their benefit within the meaning of these provisions. This view is confirmed by the practical construction which has been put upon the set-off provision in this respect.

The Government cites no case of a suit by an Indian tribe against the United States, and we know of none, in which the United States has claimed or the Court has allowed as an off-set the value of the tribe's timber or mineral rights or the like. This can mean only one of two things: Either that heretofore the Government has considered that the Indians held such rights under their aboriginal or treaty title and not as a gratuity; or, if a gratuity, that it was not a gratuity within the meaning of the off-set provision.

for the sole use of the tribe or tribes of Indians." 24 Stat. 388, 390.[1]

In the recent Act of March 4, 1933, Congress again recognized that the beneficial interest in timber on Indian reservations belongs to the Indians.[2]

Of specific instances where Congress has recognized that the whole beneficial interest in timber on Indian reservations belongs to the Indians, the case of the Chippewa Indians in Minnesota is a good example.

These Indians occupied reservations in Minnesota under the customary Indian title, Treaties of February 22, 1855, 10 Stat. 1165, of March 11, 1863, 12 Stat. 1249, and of May 7, 1864, 13 Stat. 693; *United States* v. *Mille Lac Band of Chippewa Indians*, 229 U. S. 498, 499, 57 L. ed. 1299, 1302, on which there stood much valuable pine timber. By an act approved January 14, 1889, 25 Stat. 642, Congress provided for a commission to negotiate with them for the cession to the United States for the purposes of settlement of all but a small part of their reservations upon terms therein stated. One of these was that if and when the cession should be accomplished the *timber lands* should be

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[1] Incidentally, this Act also recognizes the right of the Indians to "just compensation" for any part of reservation lands taken for public use. § 10, 24 Stat. 388, 391.

[2] The Act provides: "The Secretary of the Interior, *with the consent of the Indians involved*, expressed through a regularly called general council, and of the purchasers, is hereby authorized and directed to modify the terms of now existing and uncompleted contracts of sale of *Indian tribal timber*: * * * And provided further, That hereafter no contract of sale of *Indian timber* on the Klamath Indian Reservation in Oregon shall be entered into without the consent of the said general council." 47 Stat. 1568. [Italics ours.]

surveyed and appraised and offered for sale at public auction for not less than their appraised value, §§ 4, 5, *and the net proceeds "placed in the Treasury of the United States to the credit of all the Chippewa Indians in the State of Minnesota as a permanent fund,* * * *." § 7. [Italics ours.]

The Commission met with the Indians in a series of councils and the cession was successfully negotiated. Ex. Doc. No. 247, 51st Cong., 1st Sess. Like the act of Congress which authorized it, the whole negotiation proceeded on the assumption on both sides that the beneficial interest in the timber on the reservations belonged to the Indians. Ex. Doc. No. 247, 51st Cong., 1st Sess., pp. 77, 84, 86, 88, 94, 99, 101, 102, 152, 153, 177, 189.

The Act of January 14, 1889, was amended by an Act approved June 27, 1902, 32 Stat. 400, and the Report of Committee on Indian Affairs of the House of Representatives recommending the amendment, like the original act, treats the whole beneficial interest in the standing timber on the reservations as belonging to the Indians. H. R. Rep. No. 1473, 57th Cong., 1st Sess. Thus:

> "It may safely be said that no act has been so troublesome to the Government as has the law to dispose of the timber lands of the Chippewa Indians of Minnesota." *Ibid.*, p. 1.
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> "This bill, H. R. 13328, amends §§ 4 and 5 of the act of January 14, 1889, and your committee believes that this measure will enable the Secretary of the Interior to dispose of the pine lands at something near their true value; that the Indians will derive a vast sum from the sales, and that great good will result from the change in the manner of selling the timber." *Ibid.*, p. 2
>
> "Your committee knows that legislation which will enable the Secretary of the Interior to protect the interest of the Chippewa Indians of Minnesota is greatly

needed. The timber upon the reservations is very valuable, and, if properly sold, will bring the tribe many millions of dollars." *Ibid.*, p. 3.

Again, the Menomonee Tribe of Indians in Wisconsin occupied a reservation under the usual title, the treaty creating the reservation expressly providing that it was "to be held as Indian lands are held." Treaty of May 12, 1854, Art. 2, 10 Stat. 1064. An Act of Congress approved June 12, 1890, 26 Stat. 146, authorized the *timber* on this reservation to be cut into logs and *sold* to the highest bidder or bidders for cash and then provided that one fifth of the *net proceeds* of sale shall be deposited in the Treasury of the United States for the *use and benefit of the tribe* and the remainder put into a fund in the Treasury with interest at five per centum per annum to be paid to the tribe per capita or expended for their benefit. § 3.

The act further provided that it should not take effect until "the sales of timber and the manner of disposing of the proceeds of same herein authorized have the sanction of the tribe, evidenced by orders of agreement taken in full council; * * *." § 4.

For another instance, the Act of March 1, 1907, 34 Stat. 1012, 1038, directed that a portion of the reservation in the State of Montana occupied by the Blackfeet Tribe of Indians under the Treaty of October 17, 1855, art. 4, 11 Stat. 657, 658, be allotted among members of the tribe in severalty, and that the remainder be sold, the *timber* lands separately, and that the entire net proceeds, including the proceeds of the *timber* lands, "be paid into the Treasury of the United States and placed to the credit of said Indian tribe." Also, it was expressly declared to be "the intention of this Act that the United States shall act as *trustee* for said Indians to dispose of said lands and to expend and

pay over the proceeds received from the sale thereof only as received." 34 Stat. 1036, 1038, 1039. [Italics ours.]

Still another and earlier instance of recognition by Congress that the beneficial interest of an Indian tribe occupying a reservation under the customary Indian title extends to standing timber, minerals, and the like, is the Act of February 6, 1871, 16 Stat. 404, authorizing the sale of two townships of land in Wisconsin, including the growing timber, which had been set apart for the use of the Stockbridge and Munsee Tribes of Indians, §§ 1, 2, and providing that the gross proceeds from the sale, after deducting certain expenses, shall be "paid and appropriated for their benefit," § 4.

The Government would explain these and similar provisions as gifts and not as recognitions of a preexisting right.

But no words of gift are anywhere to be found in these provisions. And even if it could be said to be doubtful whether in enacting them Congress thought it was recognizing a preexisting right of the Indians or was making gifts to them, the doubt would have to be resolved against the latter view, not only because of the strong improbability that the Congress would make such fabulous gifts of public property, but also because, as pointed out in the opinion of Attorney General Stone, 34 Ops. A. G. 180-181, that view would have conflicted with the nature and attributes of the Indian title as judicially expounded from the beginning, of which Congress must be presumed to have known.

Even the Sioux Indians in Minnesota, who waged war against the United States, were paid by authority of Congress the net proceeds realized from the sale of the lands from which they were removed. Rep. Comr. Indian Affairs, 1890, p. XXIX. It is not probable that Congress would be making a gift to a tribe that had waged war against the United States.

Concluding a review of the whole course of legislation on this subject, Attorney General Stone in the beforementioned opinion to the President stated:

> "If the extent of the Indian rights depended merely on definitions, or on deductions to be drawn from descriptive terms, there might be some question whether the right of 'occupancy and use' included any right to the hidden or latent resources of the land, such as minerals or potential water power, of which the Indians in their original state had no knowledge.[1] *As a practical matter, however, that question has been resolved in favor of the Indians by a uniform series of legislative and treaty provisions beginning many years ago and extending to the present time.* * * * In all these instances Congress has recognized the *right* of the Indians to receive the full sales value of the land, including the value of the timber, the minerals, and all other elements of value, less only the expenses of the government in surveying and selling the land." 34 Ops. A. G. 178-179. [Italics ours.]

Reflecting the view of the Executive branch of the Government, the Reports of the Commissioner of Indian Affairs time and again treat the beneficial interest in timber on Indian reservations as the property of the Indians. For example:

> "The timber interests of Indians on allotted and on tribal lands reach a present value of $84,000,000. * * * the timber on Indian reservations * * * is valued * * * in Oregon at $27,000,000. * * * In 1911 sales of timber brought in for Indians $2,192,000." Report, 1911, pp. 6-7.

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[1] Even this academic doubt would not exist with respect to timber because of course the Indians *did* have knowledge of that.

Again:

> "The property interests of the Indians constitute one of the greatest estates ever held in trust by any organization, governmental or private. Including the lands, forests, water power, minerals, and funds held in tribal or individual ownership, the Indians' principal amounts to approximately three-quarters of a billion dollars, and from this property in rentals and interest there comes annually approximately $12,000,000." Report, 1911, p. 50.

Again:

> "The timber holdings of the Indians have stumpage value of more than $80,000,000. * * *
>
> "The Indians own tribal and individual timber valued at more than $80,000,000, * * *." Report, 1913, pp. 2-4.

And the Attorney General's Office itself has maintained that the whole beneficial interest in the lands of Indian reservations, including standing timber, mineral content, etc., belongs to the Indians, and that the United States has only a "naked fee."

Reference has already been made to the opinion of Attorney General Stone, in which, after citing the decision in *Beecher* v. *Wetherby,* 95 U. S. 517, 525, 24 L. ed. 440, 441, that a grant by the United States of its estate in an Indian reservation conveys "only the naked fee," he said:

> "If a transfer by the United States would convey only the naked fee, it goes without saying that the complete equitable property was in the Indians. The earlier and fundamental decisions make this plain." 34 Ops. A. G. 181.

And in which he also said that any doubt that might have existed in that regard

> "has been resolved in favor of the Indians by a uniform series of legislative and treaty provisions be-

> ginning many years ago and extending to the present time." 34 Ops. A. G. 178.

And further that—

> "In all these instances Congress has recognized the *right* of the Indians to receive the full sales value of the land, including the value of the timber, the minerals, and all other elements of value, less only the expenses of the government in surveying and selling the land." 34 Ops. A. G. 179. [Italics ours.]

The Government says that in this opinion Attorney General Stone did not rule on the question of the Indians' rights in the natural resources of their reservations but only expressed an inclination, quoting the statement in the opinion that "If it were necesary here to decide as between these opposing views I should incline strongly to the latter; * * *."

This position is based on a misconception of what the opposing views were to which the Attorney General referred. They were *not*, as the Government's brief states, "whether in 1924 the Indian tribes had a mere right to use and occupancy or the equivalent of a fee simple title to their reservation," but, as shown in the same paragraph of the opinion, they were, whether the Indians' interest in the natural resources of their reservations was bestowed on them by the grace of Congress or whether it was a preexisting right. P. 180. On either theory, the Indians at the time in question were the beneficial owners of these resources, and the Attorney General so held.

As either theory supported his conclusion, it was not necessary, as he said, to decide as between them. But he expressed an emphatic preference for the view that the Indians' beneficial ownership of the natural resources of their reservations was a preexisting right, and that the acts of Congress merely recognized and confirmed it, adding,

"Support for this view is found in many expressions of the courts," some of which, as we have seen, he then proceeded to cite. Pp. 180-181.

In an opinion relating to the rights in standing timber on lands of the White Mountain Apache Indian Reservation, a reservation created by Executive order, which had been subsequently included in a forest reservation proclaimed by the President under authority of an act of Congress, Acting Attorney General Knaebel said:

> "From the character of the legislation so passed in review,[1] there can be little doubt that in the mind and policy of Congress this reservation was not only a valid reservation set apart for the occupancy and enjoyment of the various tribes which have inhabited it from the beginning, and subject to be allotted in part to the individual members composing them, but was also *devoted to them in its entirety in such a sense that no part of it should be taken from them without their consent or giving something in return by way of compensation. And, of course, no distinction here is to be taken between the land and the timber growing upon it and, presumably, constituting its chief value.* (U. S. v. Cook, 19 Wall. 591.)" 29 Ops. A. G. 239, 244. [Italics ours.]

In *United States* v. *California & Oregon Land Co.*, 192 U. S. 355, 48 L. ed. 476, the briefs for the Government de-

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[1] The legislation referred to was as follows: The general allotment act of February 8, 1887, 24 Stat. 388, which was construed as validating (if there were any doubt) Indian reservations created by Executive order; and the Acts of February 20, 1893, 27 Stat. 469, and March 2, 1895, 28 Stat. 894, providing that the net proceeds from the sale of parts of the White Mountain Apache Indian Reservation, including the proceeds from timber, coal and mineral lands, shall be deposited in the Treasury for the use and benefit of the Indians occupying the Reservation.

scribed the title of the Klamath Tribes, which, as before stated, is the ordinary Indian title, as follows:

> "In the next place counsel seem to have mistaken the use by this court of the word 'fee' in distinguishing the sovereign ownership of the Government from the 'right of occupancy' of the Indians, and to look upon this right of occupancy, protected by the non-intercourse laws even in the absence of the treaty, as an insignificant shred of title.
>
> "This court used the word 'fee' merely to suggest by familiar phrase something analogous to the naked fee title to ordinary lands, the beneficial ownership of which is in another. The title of the Government is a sovereign title. The Government has no landlord from whom it holds the 'fee.'
>
> "Not only so, but the so-called 'right of occupancy' is a misnomer also. The right of occupancy, as this Supreme Court views it, is the real ownership. It is the full title, or as much title as, under our conception, any other than the sovereign usually holds." First brief, Oct. Term 1901, pp. 25-26.

And again:

> "The Government never had any real ownership of these Klamath Reservation lands, but only a possibility of acquiring an ownership." Supplemental brief, Oct. Term, 1902, p. 16.

And in a case now pending in the Court of Claims, No. M-109, *Algoma Lumber Co.* v. *The United States,* where the private claimant was making exactly the same contention that the Government is making here,[1] Assistant At-

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[1] "From the foregoing it is clear that the timber upon the unallotted lands within the Klamath reservation belongs to the United States. The Klamath Indians have merely the right to use the land, including the timber, as life tenants, * * *." Brief for Algoma Lumber Co., p. 57.

torney General Sweeny (now United States District Judge) maintained, on the contrary, that,

> "The Klamath Tribe of Indians is the beneficial owner of the timber on the unallotted lands constituting the Klamath Reservation," Brief p. 100,

citing among other authorities the opinion of Attorney General Stone heretofore referred to, with the statement,

> "We invite the Court's attention to those opinions[1] as being an *especially authoritative statement* of the law touching the character of the Indian estate and their ownership of timber on tribal lands occupied by them." Brief p. 111. [Italics ours.]

Thus, there is a uniform body of precedents, judicial, legislative and executive, supporting the view that the whole beneficial interest in the lands of an Indian reservation, including the beneficial interest in the standing timber, mineral deposits, etc., belongs to the Indians.

Respectfully submitted,

G. CARROLL TODD,
Counsel for Klamath and Moadoc Tribes and Yahooskin Band of Snake Indians, as amicus curiæ.

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[1] There was but one opinion, but it was rendered separately to the President, 34 Ops. A. G. 171, and to the Secretary of the Interior, 34 Ops. A. G. 181.

SUPREME COURT OF THE UNITED STATES.

Nos. 216 and 328.—OCTOBER TERM, 1936.

Shoshone Tribe of Indians of the Wind River Reservation in Wyoming, Petitioner, *vs.* The United States. The United States, Petitioner, *vs.* Shoshone Tribe of Indians of the Wind River Reservation in Wyoming.	On Writs of Certiorari to the Court of Claims.

[January 4, 1937.]

Mr. Justice CARDOZO delivered the opinion of the Court.

The Shoshone Tribe of Indians of the Wind River Reservation in Wyoming has sued the United States in the Court of Claims for the breach of treaty stipulations, whereby the tribe has been permanently excluded from the possession and enjoyment of an undivided half interest in the tribal lands. Jurisdiction to hear the claim was conferred upon the Court of Claims by an act of March 1927 (44 Stat. 1349, Part II), which, so far as its provisions are now material, is quoted in the margin.[1] The court gave judgment

[1] Section 1 provides that jurisdiction is "conferred upon the Court of Claims, with right of appeal to the Supreme Court of the United States by either party, notwithstanding the lapse of time or statutes of limitation, to hear, examine, adjudicate, and render judgment in any and all legal and equitable claims which the Shoshone Tribe of Indians of the Wind River Reservation in the State of Wyoming may have against the United States arising under or growing out of the treaty of July 3, 1868 (Fifteenth Statutes, page 673), or arising under or growing out of any subsequent treaty or agreement between said Shoshone Tribe of Indians and the United States or any subsequent Act of Congress affecting said tribe, which claims have not heretofore been determined and adjudicated upon their merits by the Court of Claims or the Supreme Court of the United States."

Section 3 provides: "In said suit the court shall also hear, examine, and adjudicate any claims which the United States may have against said tribe, but any payment, including gratuities which the United States may have made

for the claimant: — C. Cls. —. Neither party to the controversy was satisfied with the award of damages, the claimant finding it too low, and the Government too high. There were cross-petitions for certiorari. To fix with certainty and justice the rights and duties of the Government in its relations with an Indian tribe, the writs were allowed, and the case is here accordingly.

By treaty of July 3, 1868 (15 Stat. 673), the Shoshone Tribe of Indians relinquished to the United States a reservation of 44,672,000 acres in Colorado, Utah, Idaho and Wyoming, and accepted in exchange a reservation of 3,054,182 acres in Wyoming, with other benefits not now important. The United States agreed that the territory described in the treaty now generally known as the Wind River Reservation, would be "set apart for the absolute and undisturbed use and occupation of the Shoshone Indians . . . and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them." Reinforcing this covenant, there was a solemn pledge of faith by the United States that no persons, except a few specially enumerated, and governmental agents engaged in the discharge of duties enjoined by law, should "ever be permitted to pass over, settle upon, or reside" in the territory so reserved. The loyalty of the Shoshone tribe to the people of the United States has been conspicuous and unfaltering. A fidelity at least as constant and inflexible was owing in return.

In 1869, a band of the Northern Arapahoes, separating from the main body of the nation, was wandering about the country, looking for a home. The Arapahoes had been allies of the Sioux, who were the foes of the Shoshones. None the less, the wanderers expressed a wish to have a refuge and a settlement on the Wind River Reservation. They came upon the Reservation in 1870, and were informed by Washakie, Chief of the Shoshones, that they would be permitted to stay there for a short time while the Government was

to said tribe, shall not operate as an estoppel, but may be pleaded as an offset in such suit: *Provided, however,* that the United States may interpose to such suit or action any and all pleas of defense, affirmative and negative, legal and equitable, which it may have thereto not herein specifically barred by the provisions of this Act. In reference to all claims which may be the subject matter of the suits herein authorized, the decree of the court shall be in full settlement of all damages, if any, committed by the Government of the United States and shall annul and cancel all claim, right, and title of the said Shoshone Indians in and to such money, lands, or other property."

seeking to place them elsewhere. After a few months they moved away. The Government had no success, however, in providing them with a satisfactory home, and they continued to cast longing eyes toward the fair and fertile acres set apart for their ancestral foes. At the instance of the Commissioner of Indian Affairs, acting in coöperation with the Secretary of the Interior, a new attempt was made in October, 1877, to bring the tribes together and relieve the growing tension developing between them. One Irwin, formerly the Indian agent on the Wind River Reservation, discussed the problem with Washakie. He said that the President had no intention of placing the Arapahoes on the Shoshone Reservation, but that the desire was merely to insure peace between the tribes and to find a place for the Arapahoes nearby, on a separate tract of land close to the eastern boundary. Washakie agreed that there should be peace, but insisted that the traditional enemies of his tribe be placed at a safe distance, predicting that close contact would bring friction and fresh hostility.

Irwin telegraphed the Commissioner of Indian Affairs at Washington on October 17, 1877: "I returned from Shoshone Agency today. Held a council and made peace between Shoshones and Arapahoes." A written report, dated February 21, 1878, gave the details of the council. Even so, the telegram, it seems, had been misunderstood by the Commissioner, for in his annual report for 1877 (dated November 1, 1877), he said (p. 19): "In a formal council held last month by Agent Irwin with the Shoshones, their consent to the arrangement desired by the Arapahoes was obtained, and the removal of the latter is now in progress." Ignoring many warnings in February and later that consent had been refused, the Commissioner adhered to his erroneous assumption. The consequences of his error are visible in the events that followed.

On March 18, 1878, a band of Northern Arapahoes was brought to the Reservation of the Shoshones under military escort. The Reservation had been reduced to 2,343,000 acres by the cession of 700,642 acres in 1874 for a money consideration. The Shoshones believed that for hunting and for husbandry it was not in excess of present needs. The unheralded arrival of the Arapahoes was the cause of much excitement. There was a council the next day, at which the leader of the Arapahoes explained to Washakie that they and their horses were weary and without food, and in need of rest

and care. Thereupon Washakie agreed that they might remain for a short time to rest their horses and themselves. But the Indian Commissioner, it seems, had not brought them to the reservation for any temporary visit. On April 2, 1878, he telegraphed the agent at the Reservation to furnish the Arapahoes with the necessary food and supplies, and directed him to "report fully by mail what other measures are necessary to locate the Band of Northern Arapahoe Indians under Black Coal", their leader. The agent responded that the Shoshones looked upon the presence of the Arapahoes as "an encroachment on their rights." At the request of both tribes, he urged the calling of a council to be attended by the Department Commander, General Crook, in order that the location of the Arapahoes might be permanently settled. No reply to this request came from the Commissioner or from any one else.

The famished Arapahoes and their horses had been fed and cared for, but they did not move away. Instead of moving away, they came in increasing numbers. As early as April 8, 1878, nearly the whole tribe was on the scene. Washakie protested to the agent. The agent at frequent intervals communicated the protests to the Commissioner. There was nothing in return but silence. Months lengthened into years, and the signs accumulated steadily that the Arapahoes were there to stay. Schools were established for their benefit to the end that their youth might be adequately trained. Report of Commissioner of Indian Affairs, 1879, p. 169. Ditches were dug for the irrigation of their ranches. Report of Commissioner of Indian Affairs, 1889, p. 308. In numberless other ways their equality of right and privilege became a postulate of daily life. At length, in August, 1891, the flame of controversy blazed forth anew. The "Woodruff Commission" had been sent to the Reservation to treat with the Indians for a cession of a portion of their lands. The Shoshones took the ground that the Arapahoes should not be suffered to take part in the council and vote upon the projects. The Commission telegraphed the Commissioner of Indian Affairs asking for instructions. In reply, August 13, 1891, the Commissioner notified the Commission: "This office holds . . . that the Arapahoes have equal rights to the land on the said reservation which does not depend upon the further consent of the Shoshones, and you should conduct your negotiations with them upon that basis and with that understanding." Accordingly,

both tribes participated in the council, though a cession was not effected.

The Commissioner continued to act on the assumption that the occupancy of the Arapahoes, initiated, as we have seen, under military escort, was permanent and rightful. What is more to the point, Congress did the same. Thus, in 1897, the Government by its agent concluded an agreement with the Shoshones and Arapahoes whereby the Indians ceded to the Government part of the Shoshones Reservation (55,040 acres) for $60,000, to be expended without discrimination among the members of the tribes. In preliminary conferences the Shoshones protested that they alone should receive the stipulated payments. Their protest was overruled, though they succeeded in adding a proviso that nothing in the agreement was to be construed to deprive them of their annuities or benefits under any existing agreements or treaty stipulations. This agreement with its clear recognition of the occupancy of the Arapahoes and their equal interest in the land, was ratified by act of Congress. Act of June 7, 1897, c. 3, 30 Stat. 62, 93, 94. Again, on April 21, 1904, the Government made an agreement with the two tribes for the cession of a large tract (1,480,000 acres), leaving only 808,500 acres in the diminished reservation. Again the Shoshones protested that the Arapahoes were intruders, and refused to sign without a proviso similar to the one in the agreement of 1897.[2] Again the Government dealt with the two tribes as lawful occupants and equals. This agreement like the earlier one was ratified by act of Congress. Act of March 3, 1905, c. 1452, 33 Stat. 1016. It provides *inter alia* that "any individual Indian, a member of the Shoshone or Arapahoe tribes, who has, under existing laws or treaty stipulations, selected a tract of land within the portion of said reservation hereby ceded, shall be entitled to have the same allotted and confirmed to him or her, and any Indian who has made or received an allotment of land within the ceded territory shall have the right to surrender such allotment and select other lands within the diminished reserve in lieu thereof at any time before the lands hereby ceded shall be opened for entry." There is a

[2] "Article X. It is further understood that nothing in this agreement shall be construed to deprive the said Indians of the Shoshone or Wind River Reservation, Wyoming, of any benefits to which they are entitled under existing treaties or agreements, not inconsistent with the provisions of this agreement."

finding that 245,058 acres were allotted to Shoshone and Arapahoe Indians between 1907 and 1919 under the power thus conferred. Many other provisions of the agreement and the statute are almost equally explicit and significant in their recognition of the *status quo.* No where is there a suggestion that the occupancy of the newcomers is impermanent or provisional.

The Arapahoes held their ground, pushing the Shoshones farther to the west, and retaining for themselves the eastern section of the Reservation, found by the Court of Claims to be the most eligible portion. At all times the population of each of the two tribes has been approximately equal. There continued to come forth from the Shoshones intermittent protests, which at last reached the halls of Congress, and in 1927 had a long delayed fruition. In that year the Committee on Indian Affairs of the House of Representatives reported a bill to make atonement for the wrongs that for nearly half a century had been left without redress. House Report No. 1628, 69th Congress, 2nd Session, Congressional Record, vol. 68, part 1, p. 625. Extracts from that report are printed in the margin.[3] The bill so proposed was passed, but was vetoed by the President, chiefly for the reason that it made provision for the payment of interest at five per cent per annum on the value of any property appropriated in violation of the treaty or wrongfully disposed of. Congressional Record, vol. 68, part 3, page 2414, 69th Congress, 2nd session. On February 4, 1927, the Senate Committee on Indian Affairs reported a new bill, with the statement that it had been redrafted to correct the objection of the President and that it was identical with the earlier bill except for the interest provision, though in truth other verbal changes had been made in

[3] "Despite the fact that the United States expressly guaranteed to these Indians the uninterrupted use and occupancy of the reservation, and against the protests of the Shoshones of said Wind River Reservation in Wyoming, the northern band of the Arapahoes, under military escort, were moved upon said reservation in the winter of 1877-78.

"In order to disarm the Shoshones they were assured by the military authorities that the Arapahoes would be removed from the reservation the following year. Since then the Shoshones have frequently protested against the alleged unlawful appropriation of their reservation but have received no relief from the Government. On the contrary, the Government has allowed the Arapahoes upon the reservation and treated the funds claimed by the Shoshones as though they were the joint property of both tribes.

"The purpose of the bill is to permit the Shoshones to submit their claims for alleged appropriation of property to the Court of Claims, and your committee feels that in view of the strong showing made the bill should be enacted at an early date."

the process of revision. Senate Report No. 1389, Congressional Record, vol. 68, part 3, p. 2921. The bill so revised became Chapter 302 of the Laws of 1927, the jurisdictional act under which the present suit has been maintained.

Upon these facts the Court of Claims decided that the occupancy of the Arapahoes became definitive and permanent on August 13, 1891, when the Commissioner of Indian Affairs made public statement of his opinion that they were entitled to enjoy the Reservation equally with the Shoshones. The value at that time of an undivided half interest in the land was found to be $2,050,597.50 The value of the use and occupation between March 18, 1878 and August 13, 1891, was fixed at $332,475. The sum of these values, along with a few minor items, was $2,483,467.99, from which there was a deduction of $1,689,646.50, for offsets owing to the Government, and not in controversy here. The balance, $793,821.49 is the amount of the judgment now before us for review. As already stated, neither the claimant nor the Government is content with the decision. Both agree that there was error in fixing the value of the land as of August 13, 1891. The claimant insists that it should be reckoned as of March 3, 1927, the date of the jurisdictional act, and that compensation should be added for the value of the intermediate use and occupation. The Government insists that the value should be reckoned as of March 18, 1878, when the unlawful occupancy began. The claimant makes the additional point that, irrespective of the date at which the value is computed, interest must be awarded up to the date of the judgment on the recovery allowed.

First: The Court of Claims did not err in refusing to fix the damages on the basis of the value of the land on March 3, 1927.

The claimant takes the ground that the jurisdictional act is an exercise of the power of eminent domain. The argument is that by force of its provisions a trespass which had been unlawful, though continuous, since March 18, 1878, was turned as of March, 1927, into a definitive and lawful taking. But this is to mistake utterly the design and meaning of the statute. The jurisdictional act is not a taking of anything. It "makes no admission of liability, or of any ground of liability, on the part of the Government, but merely provides a forum for the adjudication of the claim according to applicable legal principles." *United States* v. *Mille Lac*

Band of Chippewa Indians, 229 U. S. 498, 500. No cause of action can be vindicated thereunder unless such a cause of action as, apart from the impediment of governmental immunity from suit, was already in existence. Under the jurisdictional act the court is to inquire whether the violation of the treaty of 1868 or of some later treaty or agreement or some later act of Congress has given rise to legal or equitable grounds of liability. True, the decree when it is made "shall be in full settlement of all damages, if any, committed by the Government of the United States and shall annul and cancel all claim, right, and title of the Shoshone Indians in and to such money, lands, or other property." But the claimant is not subject to a duty either under that act or any other to sue the Government at all. In the event of a failure to sue or to prosecute the suit to a decree, rights and liabilities will remain as they were before any act was passed. The sovereign power is not exercised to extinguish titles or other interests against the will of tribal occupants by force of eminent domain.

If this conclusion might otherwise be doubtful (which we do not suggest), the doubt would be dispelled by a consideration of the history of the statute. The reports of the Committees of Congress preceding the two bills—the one vetoed by the President and the one enacted into law—make it plain that the purpose was to give reparation to the claimant for an "alleged unlawful appropriation" effected in the past, not to make a new and lawful appropriation by an exercise of sovereign power. So the message of the President vetoing the first bill which permitted an award of interest, adds this comment to a sketch of the grievance of the tribe: "It seems to me unreasonable to expect that the Government should be charged with interest from the dates of origin of such ancient claims." Congress had no thought in its revision of the rejected bill to prescribe present expropriation in lieu of present reparation. As pointed out already, the bill redrafted was understood to be identical with the first one except that the interest provision had been dropped to meet the President's objection.

Second: The Court of Claims erred in holding that damages should be measured as of August 13, 1891, the date of the letter from the Commissioner of Indian Affairs to the Woodruff Commission, and in failing to measure them as of 1878, the date of the unlawful entry.

The treaty of 1868 charged the Government with a duty to see to it that strangers should never be permitted without the consent of the Shoshones to settle upon or reside in the Wind River Reservation. That duty was not fulfilled. Instead, the Arapahoes were brought upon the Reservation with a show of military power, and kept there in defiance of the duty to expel them. The decision below is based upon the theory that the letter of August 13, 1891, is the earliest overt act evincing a definitive purpose to make the occupancy permanent. But the Commissioner of Indian Affairs was not empowered to fix the future policy of the Government, still less to exercise in its behalf the power of eminent domain. He made no such attempt. All that his letter of August, 1891, expresses is an opinion as to the meaning and operation of notorious and accomplished facts. By deed as well as by word, he had done his part for more than thirteen years in shaping those facts to conform to his opinion. He had made report to the Secretary of the Interior in November, 1877, that the transfer of the Arapahoes to the Wind River Reservation was a movement then in progress. He had notified the local agent in April, 1878, to indicate any other measures necessary to settle the intruders. He had turned a deaf ear to many a remonstrance by the tribe whose possession had been violated. In so far as his own opinion and intention were facts of any moment, he had manifested them too often and too plainly, by conduct and by speech alike, to leave his attitude in doubt. Little wonder that counsel for the claimant are at one with counsel for the Government in rejecting August, 1891, as the date when occupancy became more than a temporary trespass.

If the date adopted by the Court of Claims is not accepted as the true one, the question is before us, what other shall be substituted? Looking at events in retrospect through the long vista of the years we can see that from the outset the occupancy of the Reservation was intended to be permanent; that, however tortious in its origin, it has been permanent in fact; and that the Government of the United States through the action and inaction of its executive and legislative departments for half a century of time, has ratified the wrong, adopting the *de facto* appropriation by relation as of the date of its beginning. To see the facts in true perspective we must view them in their totality and not in isolation. There are the reports at the beginning as to the purpose of the settlement; the

words and the silence of administrative officers when entreated to banish the intruders; the creation of schools for the education of their youth as for that of the youth already there (Report of Commissioner of Indian Affairs, 1879, p. 169); and most important of all, the statutes already summarized, recognizing the Arapahoes equally with the Shoshones as occupants of the land, accepting their deeds of cession, assigning to the tribes equally the privilege of new allotments, and devoting to the two equally the award of future benefits. What meaning can be ascribed to all these cumulative tokens of intention unless it be that the intruders have been confirmed in their occupancy as of the date of the intrusion? Cf. *United States* v. *Creek Nation,* 295 U. S. 103, 110. The Shoshones might protest, as they did, that in setting their hands to the agreement, they did not assent to the violation of treaty stipulations. They might reserve as much as they pleased claims, present and past, for the recovery of damages. Whatever their provisos, the outstanding fact remained that for good or for ill, the Arapahoes were to dwell upon the soil along with them. "The adoption by the United States of the wrongful act of any officer is of course an adoption of the act when and as committed, and causes such act of the officer to be, in virtue of the statute, a rightful appropriation by the Government, for which compensation is provided." *Crozier* v. *Krupp,* 224 U. S. 290, 305.

Confusion is likely to result from speaking of the wrong to the Shoshones as a destruction of their title. Title in the strict sense was always in the United States, though the Shoshones had the treaty right of occupancy with all its beneficial incidents. *United States* v. *Creek Nation, supra,* p. 109. What those incidents are, it is needless to consider now. Cf. *United States* v. *Cook,* 19 Wall. 591; *Pine River Logging Co.* v. *United States,* 186 U. S. 279; *United States* v. *Paine Lumber Co.,* 206 U. S. 467. The right of occupancy is the primary one to which the incidents attach, and division of the right with strangers is an appropriation of the land *pro tanto,* in substance, if not in form.

Third: The claimant's damages include such additional amount beyond the value of its property rights when taken by the Government as may be necessary to the award of just compensation, the increment to be measured either by interest on the value or by such other standard as may be suitable in the light of all the circumstances.

The fact is unimportant that the taking was tortious in its origin, if it was made lawful by relation. *Crozier* v. *Krupp, supra.* The fact also is unimportant that it was a partial taking only, and that eviction was not complete. *Jacobs* v. *United States,* 290 U. S. 13, 16; *United States* v. *Cress,* 243 U. S. 316, 327-330; *Hurley* v. *Kincaid,* 285 U. S. 95, 104. Finally the fact is unimportant, there having been an appropriation of property within the meaning of the Fifth Amendment, that the jurisdictional act is silent as to an award of interest or any substitute therefor. *United States* v. *Creek Nation, supra,* p. 110, 111. Cf. *Yankton Sioux Nation* v. *United States,* 272 U. S. 351, 359. Given such a taking, the right to interest or a fair equivalent, attaches itself automatically to the right to an award of damages. *Jacobs* v. *United States, supra; Phelps* v. *United States,* 274 U. S. 341; *Brooks-Scanlon Co.* v. *United States,* 265 U. S. 106, 123; *Seaboard Air Line Co.* v. *United States,* 261 U. S. 299, 306. These cases distinguish *United States* v. *North American Co.,* 253 U. S. 330, cited by the Government which "rested upon its special facts." *Jacobs* v. *United States, supra.* Nor does the nature of the right divested avail to modify the rule. Power to control and manage the property and affairs of Indians in good faith for their betterment and welfare may be exerted in many ways and at times even in derogation of the provisions of a treaty. *Lone Wolf* v. *Hitchcock,* 187 U. S. 553, 564, 565, 566. The power does not extend so far as to enable the Government "to give the tribal lands to others, or to appropriate them to its own purposes, without rendering, or assuming an obligation to render, just compensation . . . ; for that 'would not be an exercise of guardianship, but an act of confiscation.'" *United States* v. *Creek Nation, supra,* p. 110; citing *Lane* v. *Pueblo of Santa Rosa,* 249 U. S. 110, 113; *Cherokee Nation* v. *Hitchcock,* 187 U. S. 294, 307-308. The right of the Indians to the occupancy of the lands pledged to them, may be one of occupancy only, but it is "as sacred as that of the United States to the fee." *United States* v. *Cook, supra,* p. 593; *Lone Wolf* v. *Hitchcock, supra; Choate* v. *Trapp,* 224 U. S. 665, 671; *Yankton Sioux Nation* v. *United States, supra.* Spoliation is not management.

The judgment should be reversed and the cause remanded to the Court of Claims for further proceedings in accord with this opinion.

Ordered accordingly.